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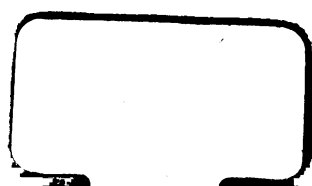
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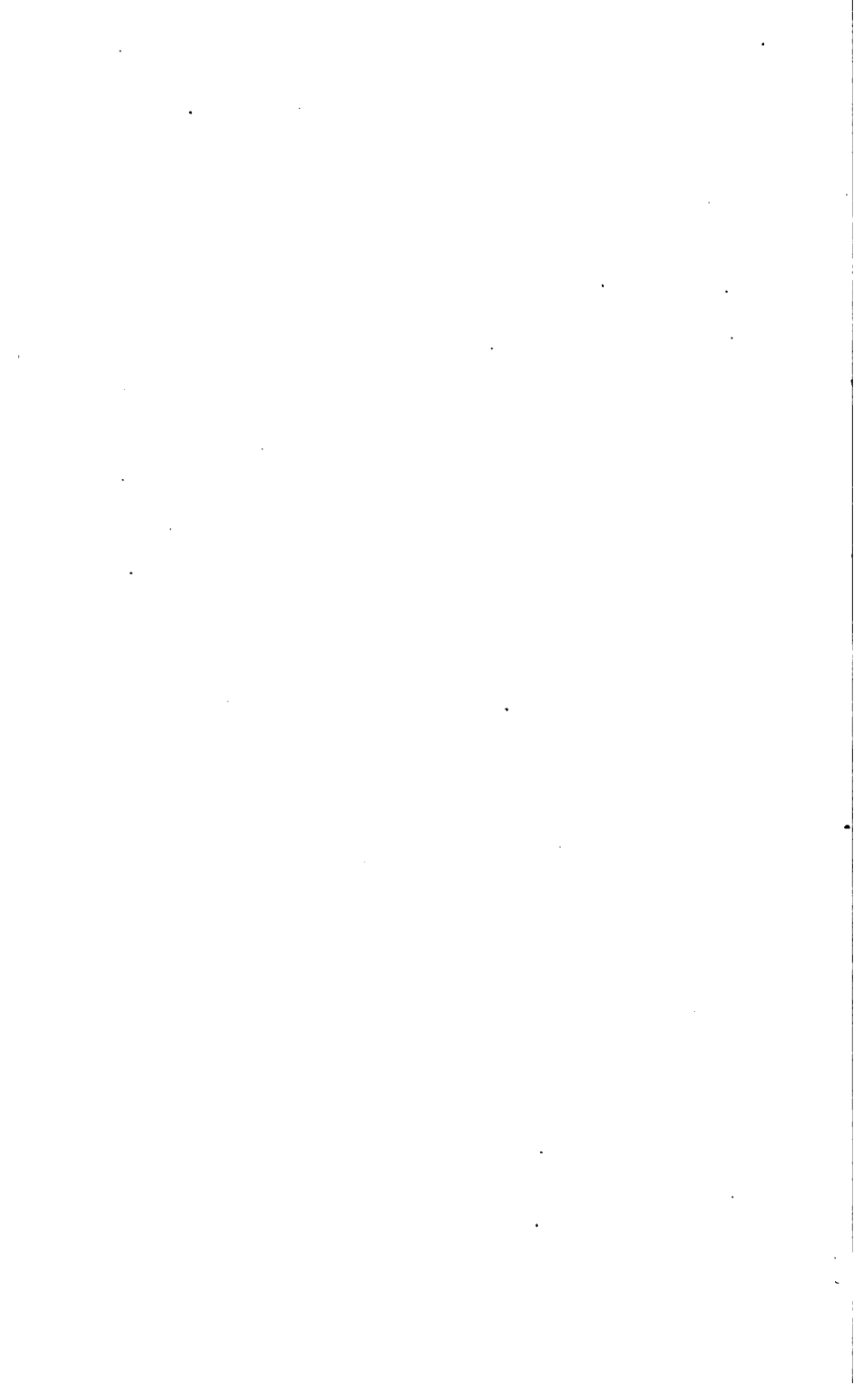
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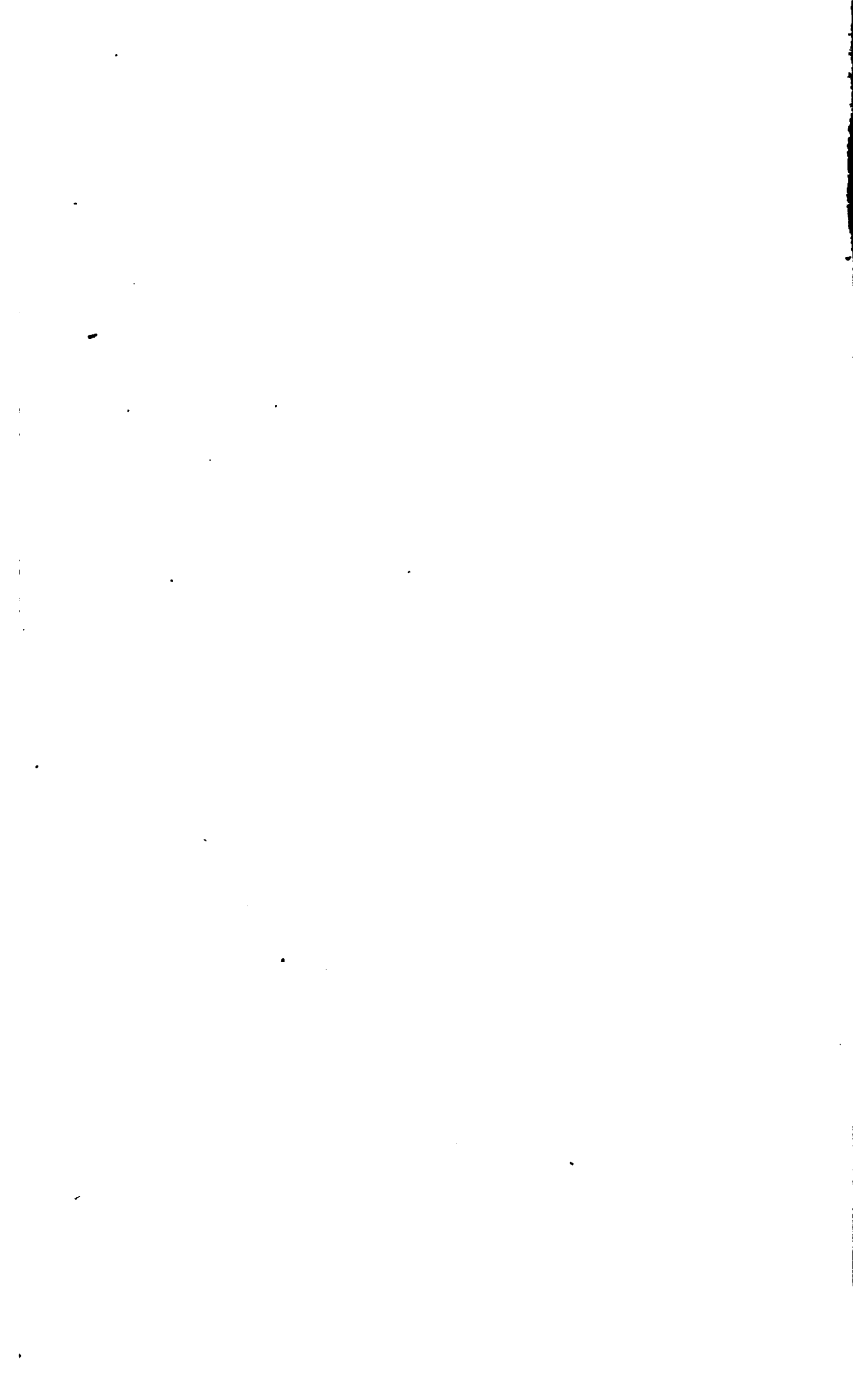
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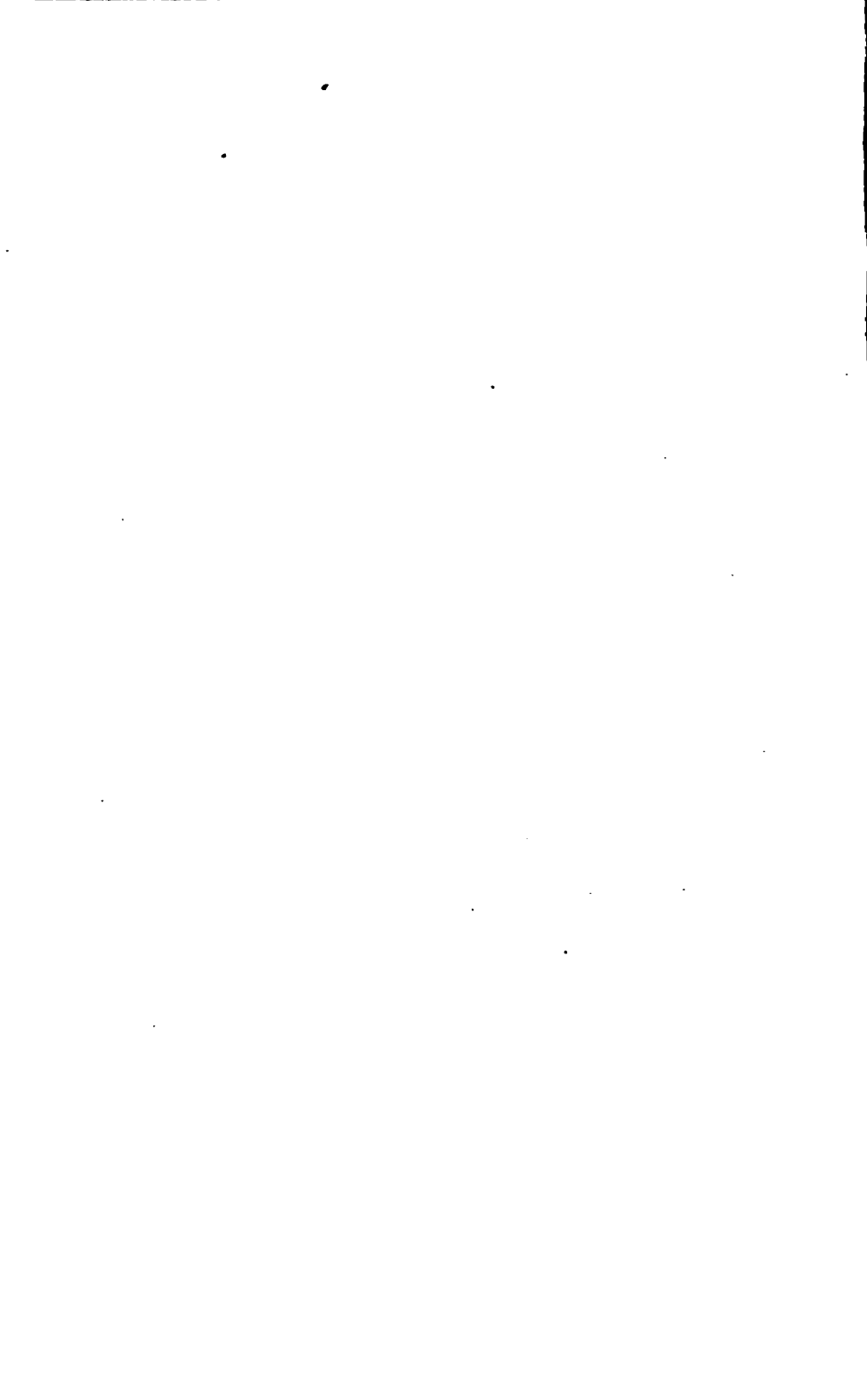
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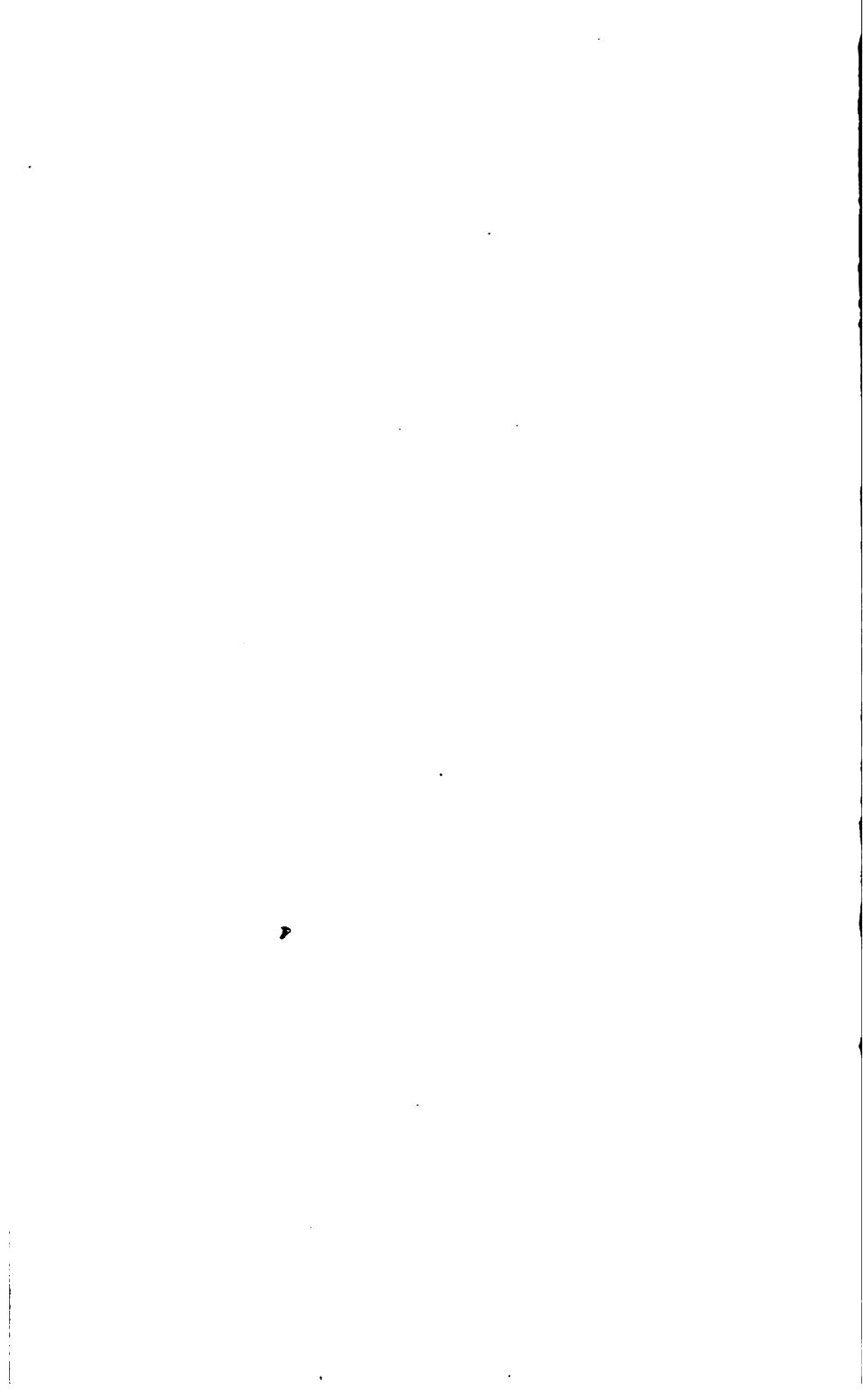
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ERRATA, No. XXVIII.

- P. 431, line 3 from foot, for "wide," read "trial."
P. 432, line 4 from foot, for "had," read "Lords."
ib. line 9 from foot, for "decreed," read "devised."
P. 437, line 10 from foot, for "received," read "reasoned."
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THE
LAW REVIEW.

ART. I. — THE CONDITION AND POLICY OF THE
PROFESSION.

1. *England as it is.* By WM. JOHNSTON, Esq., Barrister. Murray, 1851.
2. *A Dettter on Reform of the Superior Courts of Common Law to the Right Hon. Lord John Russell.* By R. P. COLLIER, of the Inner Temple, Barrister-at-Law, Recorder of Penzance. Turpin, 1851.
3. *A Letter to the Right Hon. Sir James Graham, M.P., on the Establishment of an Issue Court.* By EDWARD MORTON. 1851.

No reflecting man will doubt that a strong feeling of distrust and alienation has sprung up recently between the professional lawyer and the public, now no longer the client. A member of the Legal Profession is looked upon with a kind of terror as a destructive engine, which, though necessarily employed against an enemy, yet may possibly recoil upon the person who so employs it, and involve him, as well as his antagonist, in destruction. Most prudent men now take care to avoid lawsuits; to submit even to wrong and injustice rather than subject themselves to the expense and anxiety occasioned by forensic contention; and thus it is that only on some great occasion, or strong excitement, the professional man is employed. This is not a state of things that we wish to see prolonged. It is not at all desirable for the interests of the public, still less so perhaps for the interests of the Profession. This then may be a proper time for considering the causes of the estrangement; of pointing out freely, but in a friendly spirit, some of the errors of all branches of

the Law, and for throwing out some suggestions which may promote a better understanding. The Profession are suffering, but the community heeds it not; they are utterly insensible to the groans of the lawyer, nay, many of them secretly enjoy his calamity, and could have no better sport than to see one branch of the Profession at war with the other; some indeed would consider this a species of retributive justice.

As the friends, then, of the Profession, we shall endeavour to give them counsel as to their true interests; being well satisfied that without due attention to the signs of the times, a perilous season is at hand for them, and that they never stood in greater need of sound and honest guidance than at a time when the public are beginning to feel their strength, and would most willingly throw off the yoke under which they have so long, and we must say so grievously suffered.

Let us then, in an affectionate spirit to the Profession, but having also in view the just rights of the other branches of the community, endeavour to trace the history of the disaffection that now exists, the surest sign of which is the want of employment of the lawyer.

In this inquiry we shall take with us the observations of Mr. Johnston, who, in his "Inquiry into the Present State of England," has very properly devoted several chapters to the state of the Profession, and may be referred to as an impartial and attentive spectator by no means sanguine or extensive in his views as to Law, or any other species of Reform. He agrees with us as to the general distaste prevailing for the Law as now administered.

"We have, indeed, come to such a pass in respect to these matters, that, in the opinion of many, there is no such practical tyranny in this country as the condition of the Law. And this opinion is formed in no spirit of hostility to the Government or the State, but concurrently with the belief that the State is sincerely desirous of mitigating this evil as much as it can. But there are evils of society which grow with its growth, and even strengthen with its strength, and which become so interlaced and interwoven with the very framework and structure of society itself that, without its dissolution, such evils must, in some considerable degree, remain. It is, perhaps, not going too far to say,

that all but the very vindictive or the very rich are, in this country, exceedingly afraid to engage in law, even when convinced they have a good cause. The former class are for the moment reckless, and the latter indifferent; and so they order law proceedings to be taken. Many questions also go into the hands of the lawyers as a matter of course, because they evidently must go there. But where a choice of going to law, or not going to law, is to be deliberately exercised, many persons in England forego their rights every day, either from policy or in disgust."—*Johnston*, c. 27.

And Mr. Collier says much the same thing.

"The public have long viewed the administration of the Law with deep dissatisfaction, in spite of their perfect confidence in the ability and purity of the Judges. The most cursory glance at the jurisdiction and modes of procedure of our various Courts abundantly shows this dissatisfaction not to be referable to a mere spirit of grumbling; which a more intimate acquaintance with them affords, from the evidence of the delays, the hardships, and injustice of the Law, as well as of the patience with which those evils have been endured."—*Collier*, p. 3.

The state of the Legal Profession in England has thus become for some time the subject of much anxiety and trouble to many persons removed from any personal interest in professional concerns. The lawyer has so much to do with the daily affairs of life, that his condition is of no mean importance to the whole community. To him are entrusted so many of the affairs of mankind; he is the friend, adviser, referee, and administrator of so many; so few steps in life can be taken without his assistance; his powers are so great; his knowledge so extensive; his influence so weighty; that his state and position are matters of public importance. In a small neighbourhood he often wields all the real power of the parish or the borough, and sometimes rules as a tyrant. He acts and thinks for the community. He pervades society.

Another great characteristic of the Profession of the Law is its apparent omnipresence. The first temporal subject of the realm, the Lord Chancellor, walks close to the sovereign; seek out the vilest felon in the prison, and you find him in

confidential talk with his lawyer. Visit the saloons of the great and noble; who are the most courted and the most influential? Who enlivens the dinner-table? who leads the senate? who rules the vestry? who returns the member to Parliament? who commences the action? who issues the writ? who regulates the settlement? who draws the act? who settles the will? the lawyer comes most readily to the mind in all these matters. The lawyer that is,—the lawyer that was,—the lawyer that is to be. He prompts, thinks, acts, encourages, promotes, suggests, advises, speaks, declares, exposes, establishes; what if he also defames, disgraces, undermines, and ruins?

The Legal Profession being thus the depository of these enormous powers, it is of the utmost importance that they should be properly exercised. The weal or woe of the other classes of the community depend much upon this; and we shall therefore consider whether the Profession is now in a healthy state, and in a condition to be fully trusted; whether it does fairly represent and act up to the wishes of the community; and whether there are any remedial measures which can be applied.

We would commence by asking a question as bearing on this subject. Is a proper amount of confidence at present reposed in the Profession? Is there a just appreciation of the services rendered when resort is had to them? The lawyer may be employed when necessity, more or less extreme, forces his assistance upon the client; but this is, we apprehend, often looked upon as a remedy almost worse than the disease. The payment of money even justly due to creditors is not always a pleasing duty, but the lawyer's bill is almost proverbially that which is paid with the worst grace. Now there is no good reason why this feeling should exist. The right established; the debt recovered; the land conveyed; the evil averted, or the wrong redressed, are all worthy of just reward; the services employed for obtaining these objects are of great, it may be of infinite value, and the proper remuneration should not be grudged, nor would it be if the client did not suppose that there was something alike unintelligible in the charge itself as in the mode of making

it; that the whole transaction was steeped in unnecessary mystery; that jargon and chicanery were paid for rather than substantial justice, and that were the unlearned man behind the scenes, he could detect more than meets the unprofessional eye. The principles of justice are too deeply implanted in the human breast to call forth any reluctance in their vindication, or to cause the person who asserts them to shrink from any fair payment thus occasioned; but if justice is not obtained substantially, if a cause is decided on points not intelligible to the suitor, if practically his griefs are not redressed, but possibly aggravated, or if in redressing them the time employed is so great that the suitor is long kept in anxiety; or if the expense is excessive, he loses confidence in the administration of the law; he turns from it with disgust, and is too apt to vent his displeasure not on the law itself, but on the lawyer; and to attribute the evils from which he suffers chiefly, if not exclusively, to the connivance of the latter.

No one can suppose that this is a state of feeling advantageous to the profession. No dealer wishes his customers to be disgusted with his commodity; to take to it only on great pressure or from dire necessity. On the contrary he wishes to have at his disposal an article not only indispensable to the consumer, but which commands his good opinion,—to give him, in fact, his money's worth. Everything, therefore, that impedes the ready use of the article supplied, is not only a great evil to the consumer, but at least equally injurious to the person who supplies the article. These rules, which are so obvious in their application to all other matters, are no less true as regards the Law. It is of the utmost importance for the interests of the Profession that they should be always kept in view. At present, says Mr. Johnston,—

“No suitor can certainly tell but that he may be thrown over upon some matter of which he can have no notion till he hears of his defeat. I remember having been present in Westminster Hall when some persons of condition were prosecuted for conspiracy to defraud a young gentleman, who lost a considerable sum to them at cards. The party took carriages in London, drove to Richmond, dined, and then played. The evidence went on and

looked dark enough; but when it was closed, the learned Lord Chief Justice Tenterden said, that all the serious evidence had reference to what took place in Richmond; that Richmond was not on the Middlesex, but on the Surrey side of the river Thames; that the Court was trying a Middlesex cause; and that, unless evidence of a conspiracy to defraud within that county could be given, the prosecution must fail. And it did fail, simply upon that matter of form. But the worst thing of all in the ordinary proceedings of our law — though it does operate as a bar to the indulgence of mere litigiousness — is the expense of obtaining justice. Our Judges are all highly paid by the public: the sum annually payed out of the public revenue for Courts of Justice exceeds a million sterling; and in the Equity Courts a large part of the expense is defrayed from the interest of money belonging to suitors whose rights are not yet, and perhaps never will be, ascertained: yet still the expense to each of the contending parties who go to law is a great oppression. Efforts have been made from time to time to remove or mitigate this evil of expensiveness, but hitherto without much effect. . . . The upshot of the whole is, that, though the integrity, learning, and assiduity of the Judges are universally admitted, yet legal proceedings are generally a terror to all concerned except the lawyers. Uncertainty and perplexity in various forms — delays, postponements, disappointments, and heavy charges, — these are the recognised incidents in the history of all that go to law, even in this ‘enlightened age!’ — *Johnston*, c. 27.

Mr. Collier shows that the upshot of this is the abandonment of the Superior Courts.

“The people think that Law Reform has already been postponed too long; and the question presses whether the Superior Courts or the County Courts are to be the tribunals of the country. Assize towns now present a novel spectacle. The Chief Justice and the Bar are employed or engaged in disposing of criminals; while, in some back street, an overworked barrister is to be seen struggling through a list of seventy or eighty causes, assisted by attorneys. Is it that the public entertain less confidence in the present Chief Justice than they did in his illustrious predecessors, or that they believe attorneys better advocates than barristers? — Both of these suppositions are untrue. But the Chief Justice and the Bar cannot be got at without a degree of cost, trouble, and delay which, now that people have a cheaper sort of justice within their reach, they refuse to incur.” — *Collier*, p. 8.

Now we would ask, is this state of things beneficial to the Profession, and is the keeping the Law in this state the line of policy which should be pursued by the lawyer; and further, what have been the consequences of the views taken on these points by the great bulk of the Profession during the present Century? We repeat, that it is for the interest of the Profession that the Law should be cheap, simple, and easily accessible. No human system of laws can entirely satisfy these requirements. There are, we fear, insuperable difficulties in the way. No suit can be conducted without being exposed to risks incidental to all litigation in a civilised country, conducted by an intelligent class of men. The administration of justice, in order to run purely, must work itself clear by means of occasional turnings and obstructions. Until some more successful mode of conveying our thoughts be found than any language yet discovered, difficulties of construction must arise: acute and intelligent men will exercise their ingenuity in behalf of themselves or their clients; and so long as the contest is conducted fairly and honourably, no one can properly object. A vague and uncertain law can only be reduced to certainty by some such method. These are some of the difficulties in the way of an administration of the Law, perfectly simple and extremely cheap. We must therefore be satisfied with the nearest approach we can make to it, and all the abilities and energies of the Legal Profession should be used to obtain this result.

If therefore the Profession has not pursued this course,—if they have not endeavoured to obtain such a Law,—if, on the contrary, they, or any part of them, have opposed all efforts made to obtain these objects,—they have, we submit, totally mistaken their true interests.

It follows then, that we should endeavour to ascertain what has been the course recently pursued by the Profession in this respect; and we may consider briefly, the conduct of the Judges, the Bar, and the Attorneys.

I. *The Judges.*—Perhaps it is not to be expected of these eminent persons that they should show much activity in reforming the Law. Their province, it may be said, is to administer the Law as they find it, and to re-

ceive with deference and respect the alterations made from time to time by the Legislature; to go with them in the spirit in which they were passed, and in every way to aid the object and facilitate the operation of all Reforms of the Law. Beyond this (however desirable it may be that they should take a warm interest and even an active part in Law Reform) we are not prepared to say, that they can be expected, as Judges, to go. As peers of Parliament, and as members of the House of Commons, where this is possible,—as, for instance, in the Master of the Rolls,—it is clearly within their province and consistent with their duty, and, as we think, their bounden duty,—to introduce and superintend the necessary alterations in the Law; and we are proud to be able to state that, more especially in very recent times, we are able to point to all the late as well as the present Chief Justices of England as taking this view of their office. Lord Tenterden, Lord Denman, and Lord Campbell, are all of them memorable examples of eminent Judges who have made use of their position and practical knowledge to introduce and carry through useful Reforms of the Law; and no one is more entitled to praise in this respect, than the present Chief Justice, the author of a long series of useful reforms, including some of the very last Session, and the fast friend of all useful measures introduced by others. Here, also, is to be mentioned the Vice-Chancellor, Lord Cranworth, who has given most valuable aid to Law Reform ever since he has been in the House of Lords, which conduct is entirely consistent with his previous career in the House of Commons, where, as Solicitor-General, he was always willing and able to assist all useful Law Reforms.

But there is one Judicial Person, always a Peer, whose peculiar duty it is to watch over the alterations which time renders necessary in the Law—we mean the Head of the Law, the Lord Chancellor. And here we have a checquered tale to tell; for this office has been held in the course of the present century by the greatest benefactors to the cause—as Lord Brougham, Lord Lyndhurst, and Lord Cottenham—and its most obstinate enemy. The latter we need hardly name. The Earl of Eldon who, with a small interval, held the Great Seal up to the year 1827, thus ruling the destinies

of the Legal Profession for a quarter of a century, was a systematic, and we are bound to hope, a conscientious opponent as well to all reform of the Law as to every other reform; and it is, perhaps, to be expected that the Judges whom he raised to the Bench pretty carefully followed his lead. "It is a fact on record," says Lord Denman, in one of these interesting letters¹ with which we have been permitted to adorn our pages, "which will startle existing Judges, most of whom probably never heard of it (as I am now travelling forty years back), that Lord Ellenborough announced in the House of Lords the unanimous opinion of his eleven brother Judges, that it would be wrong to repeal the law which punished with death a larceny to the amount of five shillings in a shop! The oracle had not been consulted — it solemnly volunteered this fearful edict." And again, in a subsequent letter²: "As to what you say of the Judges, I know a somewhat analogous case. The Judges were seriously opposed to the innovation which allowed counsel to plead for a prisoner tried for his life. One of them told me that Baron Garrow had found or made some occasion to lay it down as one of the first principles of the English Law, that none accused of felony should make a full defence by speech of counsel. And when a Bill was in progress to remove that landmark of the British Constitution, our excellent friend, the late Mr. Justice Alan Park, told me that if that Bill passed, he would instantly resign his office. I need not mention that the Bill passed, and that most worthy and benevolent man survived it, and retained his office."

These are specimens of Judges appointed by, and long living in, the atmosphere of an Anti-Law Reforming Lord Chancellor: these opposed reforms, be it observed, on the propriety and benefits of which experience has now placed its seal: reforms now universally approved of, but thus opposed almost exclusively by the Judges and other members of the Profession. This feeling existed, at least, down to 1830. In that year we find an Edinburgh Reviewer in an

¹ See 14 L. R. 210.

² 14 L. R. 352.

Article on Law Reform, thus allude to judicial prejudices and the bugbears that caused them : —

“ Add to this the exalted support which the influence of such apparitions never fails to receive from the highest quarters, those reverend persons sit apart as an order by themselves, scarcely less sacred than the hierarchy, for the exposition of the laws and the dispensation of justice. They are ever found to join in resisting change, and they perform their part of the drama after a very skilful and efficacious manner. They never reason upon the matter at all, but they publicly fling themselves into the most horrid contortions as often as a change is mentioned, and the well-known phantoms are made to rise up. They affect the utmost excesses of fear at those grisly shapes, and thus propagate among the vulgar of all ranks, but specially of the highest, that most infectious of all corruptions, the loathsome contagion of alarm.”—*Edinburgh Review for July, 1830, p. 484.*

By these learned persons, and such as these, infinite injury has been done—to the cause of Law Reform—no, for that has prospered ; to the measures so opposed—no, for they have passed : to none of these, but to the Profession of the Law, as withholding from the public, measures just and right,—measures calculated to insure justice. Even men so venerated as our Judges have been, are losing weight and sinking in public estimation from this cause ; that they are thus regarded as bars and obstacles to reasonable and necessary improvements. Let us hear Lord Denman once again as to this¹, for we can have no better exponent of the true feeling of the judicial Bench :—“ Besides the constant occupation of their minds in their important functions, and the necessity for the undisturbed enjoyment of their hard-earned leisure, there are feelings in the Judges which must ever strengthen the reluctance to assent to alteration. They have administered the law as they found it with implicit confidence and even veneration, which unite in them with all obvious and instinctive motives for abhorring change. It is painful to condemn the past and present. Even if they concur in the projected improvement, they had rather that others should be the persons to counsel it.

¹ 14 L. R. 210.

What has satisfied mankind so long may be suffered to remain during their time, alas! too short at the best."

Under these or similar feelings we find too usually ranged, as enemies to Law Reform, the Judges of the Superior Courts, who sometimes, looking upon the Legislature as a sort of hostile body, set at nought its decrees, and affect almost to despise its solemn acts. They appear to feel even a sort of faint pleasure at any slip or oversight in a new statute. Instead of using their best wit to supply a deficiency, and assist the evident legislative intent, they too often embarrass and perplex what is sufficiently clear. We would willingly let pass the judicial jokes sometimes expended even from the Bench on Law Reform and on modern Acts of Parliament; but when it is remembered, that all Statutes, new and old, must come under the notice of the Judges to be construed, we tremble at the result. What reform is safe in such custody? If what is clear to all besides the Bench becomes there dark and incomprehensible, what course remains to us? The machinery we have provided to assist us in the exposition of the law fails us when most we want it. Our spectacles become bleared; and our best intended Acts, framed with care and obtained with difficulty, are worsted the moment they are put into action. We are denied any machinery for improving the language and construction of our Statutes¹; there is no one grain of responsibility on any one affecting a public Act of Parliament; all attempts in this direction are thwarted or defeated: under these circumstances we do our best: the Act is passed, after long and careful consideration, and, it may be, after much contest, and the wish of the country is frustrated by an after-clap. A motion for a new trial *non obstante veredicto* is made, and is successful; the verdict being the finding of Queen, Lords, and Commons; the reversal of their decree being made by a

¹ It should be remembered, that the first act of the Law Amendment Society was to appoint a Committee to consider the propriety of establishing a Board for revising Public Bills. The Report was printed 1 L. R. 134., and we have frequently called attention to the subject. Surely the complaints of all classes of the Profession might have been attended to. As much might be done for the public statutes of the realm, as is done for private bills and almost all private deeds, which are now prepared by competent persons, whereas there is no security of this kind as to public acts.

single judge sitting in chambers or at Nisi Prius. Many things convince us that we are fast verging towards a comprehensive code of laws, but who does not tremble at the prospect of a code to be construed by technical judges? As it is, we hear, of late, complaints from many quarters, chiefly mercantile men, that there is now no safety in an Act of Parliament; for, difficult as it may be to obtain it, when passed, it must go through another ordeal, and it must depend on the opinions of the Judges whether it is to become the law of the land. It is in this way that the Profession of the Law has become unpopular; and although it cannot be said with truth that the Judges of the Superior Courts are not respected, yet they do not always escape censure; and, on the whole, their conduct, as a body of men with regard to the reform of the Law, has tended, we fear, to injure the Profession of the Law in the estimation of the public. We ought not to conclude this portion of our subject without saying one word with respect to the present Lord Chancellor, who has, perhaps too often, appeared as the opponent of measures connected with Law Reform. On the other hand, the necessities of the country with respect to some better system of legal education are becoming apparent to his Lordship. And this, perhaps, is at the present moment the very question on which it is most important that he should have sound views, and be prepared to act on them. We cannot, therefore, bring ourselves to range Lord Truro, especially considering his present position, as the settled opponent of all improvements in the Law. At all events, as the friend of the Profession, we trust he will weigh well its present state and prospects; and that on this ground, if on no other, he will endeavour to lessen, if not remove, the weight of public odium which now presses on the lawyer. It is not too much to say, that if the Judges could take upon themselves, as visitors of the Inns of Court, as members of Serjeants' Inn, or, indeed, in such other way as to them should seem fit, to reform the present mode of calling to the Bar, they would confer an unspeakable benefit on the public, and would do much to increase the veneration in which Englishmen have so long been accustomed to hold the ermine.

II. *The Bar.* — It cannot perhaps be said that the Bar are justly to be reproached with indifference to the cause of Law Reform; but, as a body, they cannot be commended. From this branch of the Profession have proceeded most of the projects of Reform which have been brought forward within the present century; and within the last few years no one can say that these have been few or unimportant. Although the Society for the Amendment of the Law has been joined by many solicitors, some of whom have contributed Reports, and taken some part in its business, yet the great bulk of the proceedings of that Society has been contributed by the Bar. They have chiefly attended its meetings, served on its committees, and transacted its business. The formation, the labours, and the success of this Society, have done something to redeem the character of the Bar with respect to Law Reform, and to turn the rancour of the public mind from the whole Profession. It is also to be remembered that many eminent members of the Bar have been willing to serve on Commissions of Inquiry into the state of various branches of the Law, with a view to its amendment; and this often gratuitously. The Reports of these Commissions have not always been satisfactory, and they have sometimes been appointed apparently for the purpose of delaying the necessary reform. It has usually happened that this course has had the effect of damming the course of the stream for a short period, only to make it rise higher, and in the end to burst all bounds. Still the Bar is entitled to its fair share of praise in serving on these Commissions, and thus helping forward the good cause which must always in the end prevail. On the other hand, from the Benchers of the Inns of Court the important cause of Legal Education has met with great discouragement.¹ Instead of properly applying the revenues vested in them for this purpose, they have, as a body, diverted funds expressly appropriated to this object by the founders of the Inns of Court to other objects, leaving the teaching of the Law to take care of itself. Although the Benchers of two of these Inns have appointed lecturers, they have not carried

¹ We may refer to a long series of previous Articles, as establishing this and pointing out the necessary reforms. See (*inter al.*) 6 L. R. p. 225.

through any general or systematic course of legal instruction — they have founded no exhibition — they have instituted no compulsory examination — they have not even insisted on attendance at the lectures: they have thus shown an indifference to the state and welfare of the Profession whose guardians they should be. They have, therefore, justly lost the confidence of the public in this matter, which is about to demand an account of their stewardship, which it will be difficult for them to resist. A Law University must be established, and the revenues of the Inns of Court must be appropriated to the real objects of their founders. These views are familiar to our readers; they are now engaging the attention of the public; and the result of the slightest inquiry into this subject, if conducted fairly and in a searching spirit, must be a most useful reform. One half-hour's speech in the House of Commons must settle the question. In the meantime the indolence (to use no stronger term) of the Rulers of the Profession in this respect has not only brought them into ridicule, but has tended to disgust the public with the Profession. It must also be said that a Law Reformer meets with but little support from his brethren at the Bar: the general disposition is to scoff at and deride, if not to oppose, his efforts.

III. *The Attorneys.* — The two branches of the Profession to which we have already alluded, are, in a certain way, separated from the mass of the public. They may be met in society, and in all the relations of life, public and private; but they are rarely seen by the unprofessional man in confidential communication. With the Judges this, of course, is impossible; and with the Barrister, although the client sometimes attends consultations, yet this is almost always in the presence of his attorney. Here the rules of professional etiquette interpose, and they have had the practical effect of throwing the great mass of the professional business of the country into the hands of the attorney. This is not always of a strictly legal character. The attorneys are the general advisers of the public. Their multifarious duties in this respect are well described by Mr. Johnston, from whose pages we shall here make a long extract, as very much expressing our own views.

“ To every man and every community the legal adviser is a person of very considerable importance ; and, in fact, no serious step can be taken without him, for it is his business to make every thing *safe*, so far as circumstances will allow of safety being secured.

“ The position of those leading solicitors who have the affairs of great personages in their management is really very curious. They stand in the place which is, or rather which was, occupied by Father Confessors in Roman Catholic countries, and scarcely any important family step can be taken without their advice and assistance. With respect to property, it is in most, if not in all, great families, the subject of formal arrangement by legal deeds or settlements, expressed in language which no one thoroughly comprehends, and which men of the legal profession alone affect to understand. The persons chiefly interested in those arrangements know the general results of them, or what were intended to be the general results ; but the instruments on which these results depend are not intelligible to them, and if they wish to make any new dispositions of their properties, they cannot stir a single step without the solicitor to guide them. Now when people have property, almost every important act on their own part, or that of any of their family, is concerned either with getting or giving money or money's worth ; and the solicitor necessarily becomes a confidential agent in family arrangements. If a son has been extravagant or a daughter is going to be married, the worthy head of the house knows not what to do till he has stated the case to his solicitor. And these are among the simplest matters in which his advice is required.

“ Perhaps in no walk of life in England are there to be found men of such exquisite discretion as these professional advisers of great families. Their legal knowledge constitutes the least part of their value. They have the nicest appreciation of the prudent, the becoming, and the practicable ; and their legal lore is in many cases only made use of in giving due form and validity to arrangements which are based on circumstances and considerations that at first sight seem to be wholly out of the province of the lawyer. Having become confidential advisers in questions where property is concerned, they are often called upon in respect to disagreements, doubts, suspicions, and other domestic troubles, where a calm impartial judgment is required, and perfect secrecy may be depended upon. Some of them might tell very strange histories of confidences no less strange ; for your solicitor is the only man who is enabled, by his professional conscience, so to identify him-

self with his 'principal' that he will make nothing known that is confided to him professionally, no matter what interest, beyond those of his client, may be concerned. If some man or woman — it may be of rank or wealth — having committed some grave offence, goes to *confess* to the parson of the parish, the reverend gentleman may probably deem it his bounden duty to call in the police, or to inform the injured party, as the case may be. Not so the solicitor. He advises, soothes, and lays down the doctrine of *discretion*, which he considers applicable to the circumstances. Solicitors are the priests of Numen Prudentia, and thereby many of them become very important and very rich. As regards morality, the same inconvenience or evil belongs to the system of which they are the prime movers as does to the system of acting by trustees or any other representation of the interests of an individual by persons who are not representatives of his conscience. I am far from saying that respectable solicitors take no account of what a man is in honour and conscience bound to do, as well in law as in prudence. They generally consider what is becoming to a man in the station which he occupies and in the circumstances with which he has to deal. Following that rule, they cannot set aside the obligations of honour and conscience. But passions, and affections, and generous emotion, are the natural auxiliaries of conscientiousness ; especially when it is to be exercised among persons connected by blood or affinity ; and these the solicitor keeps at a distance : he may give a cold opinion as to what might be considered generous, but his business is to advise what is prudent, and to keep his clients on their guard against emotion.

“ And this is another reason why so much is committed to confidential solicitors, for great or rich personages are glad of an escape from the disturbance of what they call a ‘scene,’ meaning thereby any occurrence in which the passions or feelings are strongly moved ; and they take refuge from such agitation under the cold shade of professional advice. It is, moreover, but too true that, while the eminent professional adviser will generally, if left to himself, either do, or recommend to be done, that which is reasonable and becoming under the circumstances, yet he is not so independent but that he will yield himself in some degree to be the instrument of his employer’s anger, or enmity, or prejudice, if the employer be rich, and insist upon that course being taken. Whatever he does will, of course, be done in a respectable manner and with due regard to professional rules ; but many things which are harsh and domineering, and even unjust, may be done in this way ; and the proud and unfeeling man of wealth will not

find much difficulty in obtaining even the most eminent aid to carry out his views, if he be willing — as he generally is — that a decorous and formal manner shall pervade the proceedings, however severe in their substance and cruel in their intention. Whether in such cases the professional adviser charges any thing more in his bill, for the pain his mind may have undergone in giving vigour to insensibility, or activity to malevolence, my researches have not been able to discover. . . . So early as the statute 4 Hen. 4. c. 18., it was enacted that attorneys should be examined by the Judges, and none admitted but such as were *virtuous, learned, and sworn to do their duty*. Notwithstanding this precaution to make sure of virtue, learning, and dutifulness in attorneys, it seems that they very soon got into ill odour; for an Act of Parliament, 33 Hen. 4. c. 7., states, that not long before that time there had not been more than six or eight attorneys in Norfolk and Suffolk, *quo tempore*, it observes, *magna tranquillitas regnabat*, but that the number had increased to twenty-four, to the great vexation and prejudice of these counties. It therefore enacts that for the future there shall only be six attorneys in Norfolk, six in Suffolk, and two in the city of Norwich.

“ This prejudice against attorneys has descended to the present day, and some say, not without good reason. I have heard a man of much experience of the world remark, that many attorneys are excellent and amiable men apart from business, but the moment they become *professional* their good feelings appear to be laid aside, and their sole object to be the taking of every advantage which the Law will permit.”¹ — *Johnston*, vol. ii. c. 29.

This branch of the Profession, we regret to say, has not, as a body, improved its popularity by the conduct which it has pursued towards the Amendment of the Law. A wiser spirit has recently actuated some of its younger members²; but not only has a strong prejudice existed among the great body of this branch of the Profession, but we fear a systematic course of action against all attempts to reform the

¹ “ You hesitate between the professions of Theology and Medicine. Morally and intellectually, both are wholesome studies for one who enters upon them with a sound heart and a proper sense of duty. I should not say the same of the Law, for that must, in my judgment, be always more or less injurious to the practitioner.” — *Southey to Herbert Hill*, Feb. 5. 1831.

² These are chiefly associated in a new Society, the Metropolitan and Provincial Society, of which better things may be expected.

Law has been organised. We are prepared to support this charge by many proofs, but on the present occasion we shall content ourselves with the latest piece of evidence which has fallen into our hands. The sins of the Inns of Court of this kind are sins of omission. If they had petitioned against any law reform measure, it would fairly have been said, that in taking this step they represented the whole body of the Bar. The Incorporated Law Society is a body which stands in the same relation to the attorney-branch of the Profession. It does not number among its members all the attorneys of England, but most of the eminent members of this body in London, and many provincial attorneys, are members. To this Society the State entrusts the superintendence of the education of attorneys, their examination, and the granting a certificate of competent learning and fitness for their degrees; and the registration of the whole body: and the Society is not unreasonably looked upon as the representatives of this branch of the Profession. We regret to find then that this respectable and influential Society has thought it consistent with its duty to oppose, and oppose repeatedly, almost every reform in the Law that has of late years been proposed. Passing over for the present the large body of evidence which might be adduced to prove this, we shall content ourselves with the last Report of the Council to the Annual General Meeting presented on the 19th June, 1851, and printed in the "Legal Observer" of the 20th Sept. following. In this document we find the following passages:—

"The several bills for extending the jurisdiction of County Courts, not only in pecuniary amount, but as involving Equity and Bankruptcy business, have been frequently under the consideration of the Council and their committees. *They have presented petitions to both Houses of Parliament, in opposition to any departure from the original principle of the measure, which was expressly confined to small debts and demands not exceeding 20*l.* in lieu of the Courts which were formerly limited to 2*l.* or 5*l.*, generally undisputed, and requiring only an arrangement of the time of payment.*"

And again, as to *registration of assurances*:—

"The Registration of Assurance Bill has been several times very carefully considered by the Council, *and they felt it their duty*

to present a petition to the House of Lords, in which they set forth the result of their experience with regard to the evil which by a general registration of deeds it was attempted to remedy. The petition also pointed out the almost insuperable objections to the proposed map of the whole property in the kingdom, on which the plan of registration was based. . . . Their Lordships ultimately rejected the Bill which related to maps and land indexes, and substituted a registration by the name of grantors only. This Bill having been reprinted, the Council again examined into the practicability of the measure, and felt it to be their duty to state the objections which still remained, and several of them increased by the new form of the scheme."

Thus we have this Incorporated Law Society, as representing the attorneys and solicitors of England, opposing the extension of the jurisdiction of the County Courts and the Registration of Deeds; and although the latter Bill was modified by omitting the reference to the map, returning to oppose the Bill so modified. Now we apprehend, if there be any two measures which are more desired than any others by the people of England, these are the two; and here we have the representatives of the attorneys and solicitors of England doing all they can to prevent those desires being gratified. Instead of extending the jurisdiction of the County Courts, on which the hearts of the people of England are set, the Law Society would, if possible, confine them to debts of from 2*l.* to 5*l.*; and as to registration, they opposed the Map Index, which was approved by almost every eminent law reformer in the country¹; and not content with their success in this particular, they then opposed the rest of the Bill, when the Map Index was withdrawn. This is not the way to raise the Profession of the Law in the eyes of the public, or to improve its prospects, or to relieve the attorneys from their former disfavour, especially as it will not be denied that the real ground of opposition is in the supposed effect which these two measures will have on the power and profits of the petitioners. It may be well to consider whether these acts of the Society are consistent with its charter.

¹ We may mention a few, as the late Lord Langdale, M. R., Sir J. Romilly, M. R., Mr. Goulson, and Mr. B. Ker.

But the opposition thus attempted to these measures, and almost all others tending to amend the Law¹ — we are not aware of any one Bill for the Amendment of the Law which has been *proposed*, or which has originated with this Society — has another tendency. It has a tendency to dissuade and discourage the Bar from taking active steps in this direction ; and this brings us to another subject which has been touched upon by Mr. Johnston — the influence exercised over the Bar by the other branch of the Profession, or perhaps we should say the subserviency to the attorney under which the real state of affairs almost necessarily places the Bar.

In describing the present state of the Bar, the author alludes to the practice

“ Of solicitors bringing their sons or nephews to the Bar. These young gentlemen, by their connexions, become quite sure of obtaining a certain amount of that ordinary business, to which any man of average capacity is equal. It is this which makes it so impossible for a young man without such connexion to get into business. The solicitor has a junior of his own family competent for the junior business. And even if by some lucky chance a man who depends only on his own talents and industry should get an opportunity now and then of showing what stuff he is made of, he is not to reckon, as in the old time, that being known, business will be pressed upon him. The family interest is still too strong except in cases of difficulty and importance ; and these must be given to seniors and leading men. In his ‘*Life of Lord Eldon*,’ the late Mr. Horace Twiss, who always wrote with good sense and a nice discrimination, thus comments upon the eminent success in one or two cases, which immediately led to Mr. Scott’s rapid rise in his profession : ‘ At the present day, from the great competition of very learned and able practitioners, a few occasional opportunities do little, however they be improved. Among the more influential class of attorneys and solicitors it has become usual to bring up a son or some other near relation to the Bar, **who**, if his industry and ability be such as can justify his friends in employing him, absorbs all the business which they and their connexion can bestow ; and the number of barristers thus powerfully supported is now so great, that few men lacking such advantage, can secure a hold upon business. But at the time Mr. Scott

¹ As for instance the Evidence of Parties Act, which it appears by this same Report was also petitioned against by the Incorporated Law Society !

began his professional life the usage had not grown up, of coming into the field with a "following" already secured. Education being less, fewer competitors attempted the Bar, and even among the educated classes, a large proportion of adventurous men devoted themselves to naval and military pursuits, which have now been deprived of their attractions by a peace of more than a quarter of a century. In those, therefore, it might well happen, as with Mr. Scott it actually did, that a couple of good opportunities, ably used, would make the fortune of an assiduous barrister in London.' These are circumstances with respect to the present condition of the Bar, which cannot be gainsaid. No doubt ability, industry, and steady perseverance will still lead to the ultimate success of those who can afford to persevere—those whose purse and whose patience can stand the wear and tear of long waiting and long watching; but many there are, it may be feared, who sink in the struggle, because they are without the needful *connexion*; whilst better-befriended mediocrity succeeds, and with success, obtains new friends and the means of further advancement."—*Johnston*, c. 28.

We find the following allusion to the same subject in a popular magazine:—

"To such a degree is the Bar of England now overstocked, not only with men, but with men of sufficient ability for the work to be done, that (with the exception perhaps of those who have the power and *will* to go beyond what is considered the legitimate line by men of average honour, to advance the interest of their clients) only two classes of barristers have any chance of obtaining business,—that is, of getting to any considerable extent out of the category of the 'briefless.' One of those classes consists of those who are the relations, connexions, or friends of persons possessed of large property. In very many instances these persons direct their attorneys where to take their business; and, though no doubt such directions are often evaded, yet in a good many instances the attorney is obliged to give his briefs in particular causes, not to his own friends and connexions, but to the friends and connexions of his client. But the other and much larger class is composed of the relations and connexions of the attorneys themselves. There are instances of barristers who are at one and the same time the sons, sons-in-law, brothers, and cousins of flourishing attorneys. It will be seen at once that no man has a chance, or shadow of a chance, in contending against the weight of such

overwhelming influences as this. And besides the business which the father, father-in-law, brother, uncle, cousin, can give to the barrister, such a near relation will exert himself to ask for business from other attorneys for him. When a late eminent counsel, who died very rich, was called to the Bar, his uncle, an attorney, went round to the offices of all the attorneys he knew, informing them of his nephew's call to the Bar, and earnestly soliciting their patronage. Consequently a briefless barrister, who is totally without *connexion*, as it is delicately phrased,—which means who has no attorney's blood in him, who has not married an attorney's daughter, and who has no rich relations who bring grist to the attorney's mill,—cannot hope to become a briefed barrister.' — *Fraser's Magazine for Nov. 1849*, p. 571.

It is in this way that the grievances of the public find their way to light; and as to this part of the subject, it is difficult to discriminate the exact amount of justice in the complaint, and still more so to find any remedy. It is impossible to say that the relations of attorneys should not be called to the Bar, or that, when called, their relations, being attorneys, should not employ them. It will also readily occur to the professional reader, that many of our most eminent advocates have been, and are now, the near relatives of attorneys. The sole question, we apprehend, for the consideration of the public is, whether the powers so largely entrusted by them to the attorney are used for their benefit; — whether he is, in fact, worthy of the large confidence reposed in him? If it be correct to say, as the writer in "*Fraser's Magazine*" says, that the only channels to business at the Bar are relations being attorneys, or wealthy connexions who insist on the attorney's employing a particular barrister, we have no hesitation in saying that a gross abuse of these powers would exist, utterly destructive to the just rights, independence, and usefulness of the Bar, which are, in fact, the rights and independence of the public; and that it would be full time to consider the means of altering a system so fraught with injury to all persons concerned. But we shall no doubt be informed that the statement in this Magazine is exaggerated; but can any one assert, who is at all acquainted with the subject, that there is no foundation for the statement? No one will venture

to say that business is not thus regulated in many cases. The only point which is worthy of practical consideration appears to be this: is the power thus given to the attorney used for selfish or private purposes, or for the benefit of the public? If the former, these powers must be limited, or taken away altogether. One great cause of the Reformation was, among other sins of the Pope, his jobbing the patronage and places of the Papacy among his relations; his *nepotism*, as it was called. A stray nephew provided for, a fat living given to a lean kinsman by a Pope, would not have been objected to; but when it came to giving away *all*, or nearly all, the good things to relations, the Papacy began to totter, and Peter's pence were ill collected. Not only did the kinsmen lose the good things, but the Pope soon suffered himself. This was, therefore, unwise of the Pope. He found he had sacrificed himself for his relations, and the dogs let loose in pursuit of them, turned, and worried, and nearly tore himself in pieces. The good people, to use a vulgar expression, found that they were *sold* by His Holiness, and not all his power could save him.

So would it be exactly with the attorney. If the public find that he abuses the great trust reposed in him; — that he opposes their favourite schemes, thwarts their hearty desires, uses his own skill and learning and the money acquired from the client in preventing him from obtaining proper and useful reforms in the Law, chiefly, if not entirely, because these reforms interfere with the profits of the attorney, he may rely on it that his power, great as it now is, will come to an end, and that some other arrangement will be made with respect to the business which he now transacts.

If, also, it be found that that which is at present prohibited by the rules of professional etiquette, — a partnership between a barrister and attorney, and a division of profits between them, — practically exists, from the close relationship now existing between barristers and attorneys, it must follow that means should be taken to prevent this by some new regulations of the Bar which might meet the case; or the rule of etiquette thus indirectly violated must be exploded, and avowed partnerships be allowed between barris-

ters and attorneys. It has been said of some laws that they were made like cobwebs, which caught the small offenders and let the big ones break through; and this particularly applies to the laws of professional etiquette. These can only endure so long as they suit the convenience of society which called them into existence.

Further, the right use of the power entrusted to the attorney becomes more important if we consider the over-crowded state of the Bar, and the easy admission to its membership. These circumstances render it absolutely necessary that the dispensation of professional business should not only be in safe and judicious hands, but should be regulated by a nice sense of honour and a deep feeling of responsibility. Mr. Johnston's description of the present state of the Bar, which we believe to be correct, will at once show the reason of this: —

“During the last thirty years the quantity of barristers has been very greatly increased, and with that increase it seems to be admitted that there has been a *coincident deterioration of the quality of barristership*. A journal which gives considerable attention to these matters says, that ‘incomes at the Bar for the last ten or a dozen years have diminished a third; brilliant talent has altogether disappeared; business has diminished in a still greater ratio than incomes; while moderately capable practitioners have increased twentyfold: producing a dull dead level of mediocrity, in which we have no Erskine, no Curran, no Brougham, no Scarlett, no Denman.’ The number of barristers has, indeed, immensely increased of late years, though not quite ‘twentyfold.’ A publication by a member of the Bar informs us that the Law List of 1814 contained —

Of counsel, conveyancers, and special pleaders	-	821
And that for 1848	-	3176 ¹

¹ In the evidence taken before the Committee on Legal Education, Mr. Starkie, being asked whether members of the Profession are considerably increased, answers (288.), “I should say beyond the number that can be provided for, much. It happened that as a matter of curiosity I wanted to know at what rate they were increasing, and I find that at the Inner Temple we call about 30 young men to the Bar every year. At the Middle Temple they call twice this number; but we are more strict at the Inner Temple, and require a greater number of years, and that has produced an influx to the Middle Temple, and the number there is between 60 and 70. So that if we take the Inner Temple and Middle

The number of barristers upon the books of the Inns of Court at the commencement of 1850 amounted to about 3400; but probably not a third of that number seek business within the strict line of their Profession.

“ Still the Profession seems to be over-crowded, and that not merely by capable or ‘moderately capable practitioners,’ but by men of very considerable learning, industry, and cleverness, though obviously destitute of the high gifts of genius which have at former times made the Bar illustrious. In no walk of life, indeed, does that inimitable something which we call a genius now appear. It seems to have fled from a too practical and wealth-seeking age; but never were simple ability and the powers which industry and attention may command more general. A very learned person, whose experience goes a long way back, and whose view of the present state of the Bar I have had the advantage of lately seeing, admits that the high feeling of the Profession and the ardour of its sympathy with letters have considerably diminished. But taking into account the circumstances of the modern Bar, he considers that scarcely any thing else was to be expected. Law now-a-days, in its monstrous growth, monopolises the student’s time. Business and fees are equally diminished from their old measure, and the competitors for them have vastly multiplied. It is to be feared that, as the numbers have increased, the tone and character of the Bar have not been elevated. Thirty or forty years ago gentlemen used to be called to the Bar without any view to practise or to any pecuniary advantage. It was simply the rank or honour of the degree of barrister that was sought. That fashion has passed away; and now it is common for young men of an inferior grade, without much of classical or philosophical preparation, to press into the Profession more as a means of earning a livelihood than of acquiring an honourable fame—more in the spirit of tradesmen than of students. *This spirit makes some, though it is to be hoped they are few, stoop to modes of getting business which were utterly unknown in the more heroic days of the Profession.*” — Johnston, c. 28.

Temple together, they make about 100, and you may reckon those about one half the whole number, so that there are about 200 called to the Bar every year. And I took the whole number of barristers, and made a rough calculation, out of curiosity, and they amount to nearly about 2800.” Of these we apprehend only the odd 800, if so many, obtain any share in the business of the Profession.

This state of things is obviously fraught with danger. We constantly hear stories discreditable to the Profession which originate in the certain truth that inferior men have obtained the degree of Barrister, and have been instructed by attorneys perhaps of an inferior grade to themselves. These stories which, if true, would some of them amount to the crimes of embezzlement and conspiracy, enlivened by a slight dash of forgery, may be thought only the monstrous shapes conjured up by heated imaginations and jealous feeling; but an honourable profession can hardly co-exist with the possibility of the commission of such crimes. A great evil arises when it is possible to suppose that a profession which should be one of the most honourable in the world, and one trusted as the Profession is, and, under present circumstances, must be, can have it in its power to defile itself with such base and fraudulent acts as those imputed to it; and this brings us directly to another portion of our subject, which we would willingly not have touched on, but to which we think it our duty to allude.

We need not explain to any of our professional readers that the fees paid to the Bar in all cases (except a few exceptional ones) are paid through the medium of the attorney. The strict rule is, that they should be paid at the time the brief is delivered or the business commenced; but the convenience of all parties has altered this rule to a certain extent, and some fees are entered by the clerk of the barrister in a book, as those due for drawing or settling papers, pleadings, or drafts in conveyancing, it being not always possible to calculate the proper fee to be paid until the instrument is prepared. Thus accounts have been kept, and the strict rule being not always adhered to, business of all descriptions has sometimes gone into a book; and instead of each particular fee being paid at the time, the whole amount due has been paid at certain stated times, as once a-year, or oftener. This is the utmost length to which, as we believe, the practice of giving credit for fees has gone with any thing like general sanction, and even to this, we apprehend, some of the more rigid of the Bar object. But if it had stopped here we do not know that there would be any fair ground of com-

plaint. It would probably be more convenient for both parties to pay and to receive a considerable sum once or twice a-year, than many small payments at the time. The practice of allowing fees to enter into a book at all was one which could only co-exist with a strictly honourable and even sensitive spirit of justice; it was obviously open to great abuse, and was, perhaps, attended with so much danger that it might have been better never to have permitted it at all. The results would justify this conclusion; for now this postponement of the payment of fees to the Bar has been organised into a system, has been grossly abused, and is attended with the worst consequences.

Let us consider for a moment the position in which the fees of a barrister stand. It has long been established that a counsel cannot maintain an action for his fees. They are paid, not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand at law without doing wrong to his reputation.¹ Fees, therefore, are a debt of honour from the attorney to the counsel, and the whole theory of all existing practice rests on this understanding being most strictly adhered to. The very name presupposes a dealing between men of honour, by whom not only the rules of honesty are to be carefully attended to, but who are to be guided by the most accurate sense of delicacy. We all know that to the honest man and the Christian, "to owe no man any thing" is a positive injunction rigidly adhered to, but men of the world, the Gallios, who care for none of these things², and even the base and profligate, who are regardless of all other claims, find money to pay their debts of honour. If then the fees to counsel are not paid, it seems to show that the persons who ought to pay them are insensible, not only to all the calls of honesty and fair dealing, but to every feeling of

¹ 3 Black, Com. 29.

² The story related sometimes of Fox, sometimes of Sheridan, is possibly true of one of them. A tradesman to whom Sheridan had given a bill of exchange for his debt, calling on him for payment, found a pile of gold and notes before him, and told him he could not say he had no money. "Ah!" said Sheridan, "this money is to go for debts of honour." "Well," said the tradesman, "I will make mine a debt of honour!" and threw his bill of exchange into the fire. Sheridan then admitted he had no defence, and paid the debt.

honour. We have no hesitation, therefore, in placing a person who deliberately refuses or neglects to pay a debt of this description in the worst class of fraudulent swindlers, and if he has received the money from *his* client, which must often be the case, it is sheer robbery.

“ Now who were those robbers? Of gallows or wheel
Bore they marks, or the mangling anatomist's steel?
No, by magistrates' chains 'mid their grave-clothes you saw
They were felons too proud to have perished by law.”

It is very important, therefore, to ask whether this practice of nonpayment of barristers' fees does in fact exist to any considerable extent. If attorneys neglect the payment of their just debts simply because they could not be compelled to do so by law, it is obvious that they commit a gross breach of trust, and the fair inference is, that as they are not trustworthy in this matter, they are equally unworthy in other matters committed to them. If they would defraud a barrister of his fees they would equally deprive any other person of his rights if they could do so with impunity, or by an undue exercise of power, influence, or tyranny. If the law could not reach them they would be regardless of all other considerations; if they could not be compelled to pay they would not pay at all. Regardless of the rules of honour, which have their influence, it is said, even with thieves, they set at defiance, not only all the rules of justice and honesty, but brave all sense of shame. Does this great brand, then, seriously affect the class of attorneys and solicitors in this country? Are any number of them tainted with it? Is it considered a crime among themselves? Does any attorney who is known to be guilty of it lose caste among the members of his own branch of the Profession? These are important questions to the Bar, but they are infinitely more important to the public, and we may be sure eventually to the attorney himself. The barrister may be thus defrauded from time to time of a part of his income, but the whole fortune of the client, as well as his life and reputation, are frequently in the hands of the attorney. If then this serious charge is made against many of the class of

attorneys by a respectable and well-informed authority, it is not only the duty but the interest of the whole body to investigate it, and either to prove it to be groundless, or to see that it is redressed. Now we would willingly hope that these fraudulent and disgraceful practices, for we can use no words too strong to express our sense of their guilt, are confined to a very small number of the class of attorneys. But we are bound to say that the inquiries which we have thought it right to make before alluding to the subject at all, leave no doubt in our minds that the vice affects a large class of the communications between these two branches of the Profession; and we are in a condition to give the names of some of the gentlemen who have been so defrauded, and the names of the persons who have cheated them. We may allude to two or three facts, and we could easily point the moral by adding the proper identity. Of course we do not mean to deny that many attorneys are entirely free from this charge, and even act with great liberality in the matter; but we shall proceed to allude to some facts on this subject which have been mentioned to us, and which must rest at present on our assertion of their truth. An eminent conveyancer, who recently died, and who was justly considered the head of that branch of the Profession, left no less a sum than 4000*l.* on his books unpaid. This shows the extent to which the practice of booking fees has gone. Another class of evidence, which we may safely refer to, are the records of the Insolvent Debtors' Court. Of this some barrister occasionally avails himself (nor is it to be wondered at if this dishonest practice exists), and in their schedules the names of attorneys, as their debtors, thus appear. Attorneys also come before this Court as petitioners, and in the schedules of debts owing by them the names of barristers occur, as we are assured by those who have seen them, to a distressing extent. On one of these occasions the names of a large portion of the Chancery Bar appeared.

We shall now descend to state a few particular cases that have come to our knowledge.

Some years since a member of the present Court of Aldermen of London became the purchaser of property, the title

to which was unusually intricate. The conveyances were also very complicated; and the duty of the counsel was altogether one of a peculiarly responsible nature. The station in life of the purchaser utterly forbids the supposition that he has not paid his solicitor's bill, which of course included a charge for the counsel's fees. Yet the Alderman little suspects that he has been defrauded of the amount of those fees. Nearly ten years have passed away since the transaction. Yet the fees of the counsel have never emerged from the pocket of the solicitor to that of the barrister.

Another of our correspondents informs us that he has twice been employed to draw the deeds of settlement of highly respectable Joint Stock Companies, which are carrying on business in London under Boards of Directors of acknowledged credit. Considering the amount of a solicitor's bill for the preparation of deeds of this sort, it cannot be supposed that he would suffer a prosperous company to remain long in his debt for a sum so important to himself, though insignificant to a company. For neither of those deeds, however, has the conveyancing counsel who prepared them received a farthing from the solicitors who instructed him: and the Directors who have paid these charges, including counsel's fees, rest ignorant of the deliberate misappropriation of the amount of those fees.

In another case a considerable sum was owing to a barrister by a firm in large business, which retained the money paid for fees, in spite of innumerable applications, for two years after it was proved they had received it. In another case the solicitor was employed by a city company, which paid large sums expressly for counsel's fees, which it was also proved were misappropriated, and never reached the counsel.

In another case one of these defaulting attorneys is Clerk of the Peace of a Midland County. The barrister has been advised to write to the Lord Lieutenant, and this probably may be successful.

In another case the solicitor withholding payment is concerned for an important Railway Company, and it has been said that if they were acquainted with the fact that the money is withheld, it might influence them in their continuing to employ their present solicitors.

To these disagreeable, if not disgraceful, shifts is the Bar reduced!¹ And we have scores of such cases before us, which we shall refrain to give from their sameness with those we have referred to.

Threats of all sorts are resorted to: in some cases all are ineffectual. In others the money due is paid, but the client is lost, and goes elsewhere to find some barrister who will submit to robbery; and to this painful alternative is the barrister reduced. He must either work for nothing, and say nothing about it, or he must complain and find that perhaps his only client leaves him never to return. If he acts like a man of spirit and a gentleman, he is doomed to brieflessness, and to find his rivals, who will submit to any meanness, fraud, or degradation, in full employment. The effect of all this, we need not say, is most prejudicial to the character and standing of the Bar. If they submit to such treatment they make themselves parties to the frauds thus committed.

A friend of ours has heard young men destined for the profession of a solicitor, openly express the advantage of carrying on business in London, by reason of the accessibility of counsel, and the liberty of postponing the payment of their fees to an indefinite period. The expression used was, that "*Some capital is wanted, but counsels' fees may be paid at any time.*"

It is of importance to country solicitors, who are understood to settle their accounts half yearly with their town agents, that their characters should not become tarnished by the defaults of the latter. In one instance reported to us, a counsel has done business for three years for a professional firm in the west of England; but upon not one of their papers received through their agent during the period in question has a single fee been paid to the counsel. He, however, has no certainty whether the country client or his London correspondent is in fault, though the presumption is that the latter is the culprit.

The present system of delay in payment of fees also deprives counsel of the means of performing acts of grace towards suitors, on those occasions when the courtesy of the Profession requires him to return the fees marked on his

¹ See note A. *post*.

brief. There is high authority for this course of proceeding, when a solicitor or barrister, being a plaintiff or defendant, becomes personally liable, by the loss of the cause, to pay the costs out of his own pocket; and these occasions not unfrequently occur. In one important case of this description which has come to our knowledge, the town agent has received the fees for counsel from his country client to the amount of 200 guineas, has made no payment to the counsel, and keeps that fact concealed from the client, who naturally imagines that the counsel has his fees snugly in his pocket. The counsel wishes to save the suitor from this portion of his loss: but no communication of his desire to the town agent will conjure the amount into the possession of the suitor again. A waiver of the fees by the counsel would in this case merely benefit the town agent.

We have now said enough. If we find it necessary to accomplish the redress of this miserable state of things, we shall not hesitate to give the names of persons so improperly conducting themselves either as debtors or creditors, and we are already in possession of much evidence on this subject. But there are some other means for remedying the evil to be first considered.

We do not hesitate to say that the Bar have the power to redress this monstrous abuse, if they will only act with spirit and as a body. And this we submit they are bound to do as gentlemen and men of honour. It is possible that the most eminent men in the Profession do not suffer much in this way. They can command payment of their fees, and in fact make any terms they please. Not so the humble junior, who is perhaps entirely dependent on his professional earnings, and if they are taken away has nothing to fall back upon. How can he, surrounded by jealous rivals, act alone with thorough independence? If he does this, he risks more than he can fairly be called upon to hazard; and this is the class of men whose case we wish especially to bring under the notice of the leaders of the Bar, who are the more bound to act as the evil may not press on them. The existing system as to payment of fees is injurious to the honour and independence of the Bar. In the present crowded state to which we have already alluded, a premium to doubtful, if not improper

practice, is held out. Let us take a very mild case. Say there are two barristers on the same staircase, in the same walk of the Profession; the one gives longer credit than the other. This in some cases really means working at lower fees. Mark then the disgraceful practices to which this may lead, and the injury done in this way to the credit and real respectability of the Profession, and so far as it is relied on for strict honour and integrity, to the public.

But we waste words in dwelling upon this. Assuming then that we are right as to the fact of the existence of large arrears of fees, and that there is no legal mode of enforcing their recovery, let us see what remedy remains for the Bar.

We have heard recently that the existing unhealthy state of things has led to some disagreeable proceedings; regular dunning letters are only too common, and of late an appeal to the Attorney-General has been threatened: a more vigorous and effectual proceeding (which we know has been resorted to) has been for the barrister's clerk to write to the client of the attorney to ask whether he has paid his bill to the attorney; in which case it has been thought that an action for money had and received would lie. Indeed, we understand that Lord Lyndhurst, C. B., held that the Court would entertain an action under such circumstances. And in Scotland, (where, however, little of this grievance we believe exists,) we are informed that the fees may be there attached by the summary process of arrestment known in that country.¹ On this side of the Tweed, the barrister sometimes takes the law into his own hands, and instructs his clerk to part with no "papers" until the fee is paid. We have heard indeed of this demand being resisted, and of a conflict taking place on the point. To such unseemly contests and correspondence does the existing practice give rise.

But passing over all these disagreeable stories, we come to the remedies that we propose.

First then, we say that this is a matter which for their own sakes should be taken up by the attorneys themselves. Thank God! there are many members of this important body

¹ See Note B., *post*.

who are entirely innocent of the offence to which we have alluded, and who would, we are sure, be as little guilty of any practice of the kind, as any member of the Bar. But they have the means of investigating the charge, and of punishing the offender. A charter was granted to the Law Society alluded to, on the grounds of watching over the respectability of a part of the Profession, and excluding unworthy members. Let this Society then act on their powers, and on any flagrant case of this nature being made out,—and we are convinced that there are many,—let them use their best efforts to remedy the evil. This, we submit, would be comparatively easy for them, — would reflect credit on the whole body of attorneys,— and would do much to satisfy the public that they were indeed worthy of the great trust reposed in them, and this more especially at a time when they are seeking relief from a burden imposed on them by the State.

Failing this remedy, which is preferable to all others, it is for the Bar to consider how far they can, with the assistance of the Bench, effect a remedy. The English Bar is not a faculty, and the Attorney-General has no power, we apprehend, to convene a meeting, or to act on behalf of the Bar. He is not the representative of the Bar, as the Dean of Faculty is in Edinburgh, or the Battonier is in Paris. We do not think much good would result from a meeting of the Bar on this subject, especially as one called some time ago on one branch of it was a signal failure. The only useful part, we apprehend, that could be taken by the Bar in this matter, would be to bring it before the Court in the shape of a motion to strike any attorney off the roll, as an offender in this particular, and to compel payment of the money due.

We do not see how a Judge could refuse this relief, or what answer could be given to such an application. An attorney has been compelled to execute a contract, void under the statute of frauds, and on this principle it appears to us that the Court would compel an attorney to pay his fees. If the Judges did not take this course, they would probably think it necessary to lay down some new rule in this matter, which would relieve the Bar from their present anomalous position.

But supposing that the Judges refuse all assistance, and

the attorneys decline all aid, what remains to the Bar? Is there no remedy in the hands of the Bar itself, as against the attorney? Is the Bar to cease to exist?

The only act his guilt to cover,
To hide his shame from every eye,
To give repentance to the rover,
And wring his bosom, is — to die!

We doubt whether this is the only way. Are barristers to see the easy work of the Profession carried to sons and nephews of attorneys, which shall be liberally paid for, and is the real work to be done by a laborious drudge who is cheated of the lawful fee so justly due? Not only should this not be done, but it should not be possible. Some new rule on this subject is necessary, not only for the sake of the Profession, but of the public.

However great our confidence in attorneys and judges, we think there is still a remedy, if the aid of both is not sufficient to give complete relief. The Bar has one body to fall back upon, more powerful, they may be assured, than either one or the other of the forenamed bodies,—we mean the Bar itself. It is only necessary for the Bar to put forth its strength to carry itself quite clear of all difficulties. The rules of etiquette are not to be altered slightly or without sufficient reason. They are in many cases well founded, and often exist for the convenience of society. We are for this reason very unwilling to alter that rule which does not permit the barrister to take business except through the medium of an attorney. We agree with Lord Campbell, C.J., that although there is no law against such a practice, yet it is a convenient regulation; and further, we have no hesitation in saying that if the rule was entirely abolished, some such relationship as now exists between the barrister and the attorney, would spring up again in the shape of a partnership between members of different branches of the Profession, or members of the same branch. The division of the labour is, in fact, absolutely necessary: some men make good advocates, others good attorneys. You sometimes see them out of place. Now and then an attorney is admirably qualified for the Bar, and here

and there a barrister would be more successful as an attorney ; but few men indeed are qualified to undertake successfully both branches of the Profession. We wish, therefore, to preserve the present rule, if it still works well ; but if it does not, and is abused, the same convenience of society which created it, can annul it, and create a new rule, which may meet the exigencies of the present times.

We have no hesitation then in saying, that if the abuses which we have pointed out can be remedied in no other way than by altering the present rule as to briefs being taken only through an attorney, the sooner it is altered the better, and on this point we would call attention to a conversation on this subject, which took place in the House of Commons in the last Session (July 9. 1851), with reference to a clause proposed to be inserted in the County Courts Bill.

“ Clause 11. proposed to exempt from the operation of the measure the provisions of the 9th and 10th Victoria, by which no person is entitled to practise in a County Court ‘ unless he be an attorney-at-law or a barrister instructed by such attorney, or, by leave of the Judge, any other person allowed by the Judge to appear instead of such party ; and no barrister, attorney, or other person, except by leave of the Judge, is entitled to be heard as counsel for any other person.’ ”

“ The ATTORNEY-GENERAL, in support of the clause, said he by no means desired to create any undue monopoly on the part of the Bar, but, on the other hand, he desired, and he trusted the House participated in the feeling, that the Bar might not be destroyed. At present in these Courts, under the operation of the statute, the attorneys, by whose intervention alone could barristers be employed, were allowed to practise themselves as advocates ; and the result of this had been a widespread conspiracy on the part of the attorneys who practised in these Courts to keep all the advocate business to themselves, and utterly to exclude all barristers from any participation in it whatever. The honourable and learned gentleman read from the *County Courts Chronicle* of February, 1850, an address from an attorney practising in those Courts, in which he pointed out to his colleagues throughout the country, that all they needed to do was to carry out the provisions of the act in their favour, and they would effectually and for ever exclude the Bar from any share whatever in the County Court business. The honourable and learned gentleman also read a letter from a tradesman, who complained that having a demand in

prosecution in a County Court for 48*l.*, the attorney whom he employed had threatened to throw up the case, if he persisted in his request that a barrister might be employed. In a word, it might be affirmed that from the infinite majority of these Courts barristers were excluded; and the question was, whether, for the sake of the public itself, this was a desirable thing? It appeared to him simply as a general proposition, that the business of the advocate in all our Courts, Superior or Inferior, should be conducted by men of trained education as advocates, of established position as gentlemen, as men of honour. It was quite clear that at present the attorneys practising in these Courts were, as a general fact, not of the higher class in their profession; but, be they whom they might, it was in his opinion essential to the due administration of and to the dignity of justice that in these Courts, as in the Courts above, the persons who prepared the case up to a hearing should, in all matters above those of a quite ordinary character, be the persons also to conduct the hearing. It was a fallacy to suppose that economy was consulted in behalf of the public by the exclusion of barristers, for the fee which would be received by counsel would be no greater in amount than that which the attorney duly pocketed when he appeared as attorney-advocate; and therefore the expense was precisely the same to the client, whether he was heard by attorney-advocate or by barrister-advocate. He had received a letter from a gentleman of entire veracity, mentioning to him a case in which a snug party of seven attorneys having got possession of a County Court, and completely ousted all barristers, had leagued together to accept no retainer whatever, unless with a fee of three guineas, paid beforehand. This was an illustration of the cheap justice which the public was to have if the attorneys were to have things all their own way in these Courts. It was, in his opinion, eminently essential that a well-trained Bar should be attracted to these Courts, by the expectations of a fair maintenance.

“ Captain FITZROY said he did not precisely understand whether the Attorney-General meant to give exclusive audience to barristers in these Courts; but, if he did so, propose, he should undoubtedly divide the Committee against the proposition. The adoption of any such rule would at once defeat the great object of the measure, which was speedy and cheap justice. Enact that cases were not to proceed unless a counsel was heard on either side, and the delay would become such as altogether to deter persons from seeking that remedy with which these Courts were at

present more and more effectually providing them for the attainment of their rights and the vindication of their wrongs. The Legislature had no right to dictate to clients in these Courts whom they should employ to advocate their cause. There was no more propriety in maintaining professional monopoly than in maintaining commercial monopoly ; and, if it came to be a question between the benefit of the Bar, as such, and the benefit of the community, the former must give way. There was nothing at this moment to prevent barristers from practising in the County Courts ; it was within his own knowledge that in the Oxfordshire County Court circuit barristers practised, without encountering any thing at all resembling that persecution at the hands of the attorneys which the honourable and learned gentleman had, properly enough, denounced.

“ Sir G. STRICKLAND said the proposition of the Attorney-General was merely the result of the jealousy which the Courts at Westminster felt at the progress which was being made in popular estimation by the County Courts. The whole matter was a squabble between the attorneys and the lawyers, which the Legislature might well leave those parties to fight out. The proverb said, when personages of a particular stamp fell out, honest men came by their own.

“ The ATTORNEY-GENERAL said, that as he saw the sense of the Committee was against exclusive audience being given to the Bar, he was quite willing to substitute for the clause before the committee a clause to this effect : — that in all cases where clients desired that another person than their own attorney should appear as their advocate, such other person should be a member of the Bar.

“ Mr. HENLEY said that his own opinion, in which he was authorised to state the right honourable member for Ripon fully shared, was, *that attorneys and solicitors should have a fair field and no favour in these Courts, leaving parties in each case at full liberty to employ an attorney or a barrister at their own discretion* ; but he had no objection to accept the modified clause now proposed by the Attorney-General. At present there could be no doubt that, by the operation of the words of the 9th and 10th of Victoria, barristers were virtually excluded, whereas it was his firm conviction that the permanent success of this new system would entirely depend upon the regular presence of a competent Bar. The Judges came to these Courts fresh from Westminster Hall, and prepared to administer justice in a spirit of energy and

efficiency to which they had been accustomed ; but if their mettle was not kept bright by the friction of practitioners whose opinions they esteemed, that mettle might, perhaps, rust somewhat.

“ Mr. HUME quite concurred in the expediency of having a Bar attached to each of these Courts.

“ Mr. E. DENNISON considered that the Legislature should equally provide against the monopoly of attorneys and against the monopoly of barristers in these Courts.

“ Mr. FRESHFIELD considered that the dignity, and the consequent efficiency, of these Courts would have been best promoted by the clause which the Attorney-General had originally proposed.

“ The SOLICITOR-GENERAL supported the proposed clause. Let the House recollect that it was to the Bar of England that we owed in a vast measure the great liberties of this country. It was Lord Coke who framed the Petition of Right ; it was Lord Somers who prepared the Bill of Rights. It had ranked amongst its members the most eminent supporters of our liberties. But, further than that, he would ask, what would be the state of property in the country if they allowed it to be disposed of by Judges who had not the responsibility of giving their decisions in the presence of a Bar ? The honourable member for Oxfordshire, who had had experience of that, had told the House his opinion on the point ; he had told them that they could not have the security of an able Bench unless it were watched by an able Bar. Nothing could be done more disastrous to the suitors, nothing could be done more to degrade these Courts and make them odious and disgusting in the eyes of the country, than to withdraw the Judges from the supervision of an efficient Bar.

“ Lord R. GROSVENOR said, the honourable member for Boston had stated that, having practised for many years as a solicitor, it might be supposed that he regarded the proposition of the Attorney-General with some degree of disapprobation, as militating against his Profession ; but the fact was, that the Profession viewed the County Courts with unmitigated dislike ; for their great profits consisted in the retention of Westminster Hall as it was. He (Lord R. Grosvenor) was therefore most anxious to reduce the profits of attorneys and solicitors, as he believed he was doing in maintaining the County Courts as they were. Now, as he understood the proposition, it was this :—That at that moment an attorney, if he did not choose to advocate a cause himself, might ask another attorney, called an advocate-attorney, or, as they had been

named, one of a hybrid class, to undertake it for him ; but, now it was proposed that the attorney should not be able to do that, and that, if he wanted assistance, it must be entrusted to a barrister. To that proposition he should most unwillingly assent. No gross case had been brought forward in which this hybrid class had abused the trust reposed in them ; and, having himself been in those Courts, and experienced how well and cheaply justice was there administered, he should be sorry to alter the present method of proceeding.

“ Mr. ANSTEY approved of the amended clause. If the monopoly of the Bar were to be guarded against, much more for the interests of the people ought the monopoly of the attorneys to be guarded against. The House was aware that complaints had been made that suitors were prevented from having a barrister for their advocate. A barrister had told him that he was waited upon by a poor man, who requested him to hold a brief in a cause that was coming on on the following morning. He refused, unless the brief were handed to him in the usual way, through an attorney ; to which the poor man replied, that that was impossible, for an attorney who had almost exclusively all the practice at the Westminster County Court had told him that if he insisted on having a barrister he would, at the last moment, throw up his case ; and similar cases were continually occurring. In the colonies a learned, intelligent, and able Bar had been destroyed by that depraved system. He knew, from his own experience, that it was the case in Van Diemen's Land ; and the same consequence must follow here if the same system were adopted. Although he insisted, in the name of economy and justice, on the right of the client to employ whom he pleased, and to instruct counsel personally, and not through an attorney, still, having regard, not to a monopoly of the Bar, but to the interests of the clients themselves, he objected to arm attorneys with the great additional power which this proposed innovation would confer upon them.

“ Mr. CARDWELL said, what they wanted to do was very obvious ; it was to put an end to all restrictions unfairly imposed either on one class or the other. They had been told that there were combinations among the attorneys to oust the Bar from these Courts. Let them then put an end to all the machinery by which those combinations became possible, and then let it be equally clear that in these Courts there should be no necessity for a poor client to have any advocate at all unless he choose. Surely that could be put in a short intelligible form. Let them then repeal the statu-

tory restriction which prevented the Bar from communicating with the parties themselves, and then let the Bar review its own etiquette. He would then propose to recite in this clause the provision of the statute of the 9th and 10th of Victoria, and then let them say, 'Be it enacted that the said last-recited provision be repealed,' and then enact as follows, 'and that it shall be lawful for any person or party to the suit, or for an attorney conducting the suit, or a barrister retained by or on behalf of either party to the suit, or, by leave of the Judge, any other person, to appear for him and address the Court without any right of pre-audience or exclusive audience, but subject to such regulations as the Judge should from time to time direct for the transaction of the business of the Court.'

"Mr. J. EVANS thought it would be enough to strike out the words 'instructed by an attorney,' occurring in the provision referred to by the honourable member for Liverpool.

"The ATTORNEY-GENERAL said there was only one point in which the clause proposed by the honourable member for Liverpool differed from that proposed by the Chancellor of the Exchequer. The hon. gentleman proposed to apply the clause to cases under the old jurisdiction as well as to the new. Now, it might be desirable, if they put all parties on a fair footing, to have an uniform course of proceeding. As he understood the honourable gentleman's proposition, a party would be entitled to advocate his own cause, or an attorney might be his advocate, or, if he preferred it, he might have counsel, and he might either instruct his agent to retain counsel, or he might go directly to counsel and instruct him. The latter was a question of etiquette with the Bar, and they would find out what the feelings and wishes of the public were, and must act accordingly. That however was, as he understood, the effect of the clause, and he believed it would be satisfactory to everybody, and he trusted, therefore, the House would support it.

"Mr. CROWDER said that he had received information of secret partnerships being formed between attorneys and the attorney-advocates to divide the profits between them ; and there had been instances in which combinations had existed to prevent the Bar from being employed. He would agree to the clause as proposed by the honourable member for Liverpool, but he did so only because the House appeared to be against exclusive audience to the Bar.

"Mr. AGLIONBY thought it better that barristers should receive

their instructions from attorneys instead of from the parties themselves.

"Mr. COBDEN wished to know whether the clause of the honourable member for Liverpool would allow of one attorney employing another attorney to advocate a cause, or was it confined to the attorney conducting the cause? He thought the parties ought to be left to themselves. All the difficulty raised by the Attorney-General as to barristers would be best met by leaving it to free competition.

"Mr. MULLINGS thought it should be as open to employ attorneys as advocates as to employ barristers in that capacity.

"Mr. CARDWELL explained. There must be a security for the suitor in these Courts, and that must be either by having attorneys liable to actions at law for neglect of duty, or barristers, liable to the control of the opinion of the Bar and the benchers of their Inns of Court, or persons who by leave of the Judge addressed the Court, and were therefore answerable to the Court. He believed it would meet the unanimous wish of the House if he substituted the words 'attorney of the Superior Courts of Record,' instead of the words, 'attorney conducting the suit.'

"The clause of the honourable member for Liverpool was then read by the chairman with the substituted words.

"Mr. FITZROY suggested that the words 'subject to such regulations,' &c., to the end should be omitted, as they might give the Judge the power of granting audience to the Bar.

"Mr. CARDWELL said he should be deeply grieved to believe, and indeed he could not possibly imagine, that any Judge of these Courts would so pervert an Act of Parliament, which declared that there should be no exclusive right of audience, as under the words in question to make such a regulation as would give to the Bar that exclusive right. It was indeed a melancholy suggestion to be made that the Bar and Judges of this country should be capable of so gross a fraud upon an Act of Parliament. If the words were of no value, strike them out, but let it not be done on the ground suggested by the honourable member for Lewes.

"Mr. FITZROY said, the Judges of these Courts had already the power of making such regulations for facilitating the business of these Courts as were necessary. These words, therefore, were superfluous, were unnecessary, and had better be omitted.

"The ATTORNEY-GENERAL said, that having again looked at the clause of the honourable gentleman, he must ask him what it meant. The honourable gentleman had spoken of having persons

responsible to an authority, but his clause appeared to let in the very class of attorney-advocates whom he would wish to exclude.

“ Mr. CARDWELL said, that what he proposed to do by his clause was this — that an attorney, if he appeared as an advocate, should be an attorney of the Superior Courts of Westminster, and retained by the party; and should, therefore, be liable to an action at the suit of the party for negligence.

“ The ATTORNEY-GENERAL said, that by the clause as it stood, if attorney A. employed attorney B., attorney B. would be entitled to act as the advocate of the party.

“ Mr. COBDEN said, that that was what the House meant. Attorney A. might employ attorney B., and attorney B. might employ attorney C., and so on to the end of the alphabet, if it were for the convenience of suitors. That was the question before them, and he hoped they would not part with this clause until there could be no further mistake about it.

“ Mr. CARDWELL was quite ready to insert the words ‘to be retained by or on behalf of,’ a second time, so as to follow the words ‘attorney of the Superior Courts of Record,’ as well as the word ‘barrister.’

“ The SOLICITOR-GENERAL said, that an attorney retained by an attorney would not be liable to an action at the suit of the party, and the mischief of such a proceeding would be irreparable.

“ Mr. COBDEN said, that the practice in the County Courts had been to employ attorneys. The public had uttered no complaint against it, and all he asked was to leave it so.

“ The SOLICITOR-GENERAL said, that the difficulty would not be cured by the words ‘an attorney of the Superior Courts of Record,’ for, although an attorney was liable to an action by his client for negligence, yet he was only amenable to the Superior Courts when he had been guilty of gross fraud.

“ Mr. CARDWELL said, he certainly thought that the person who acted must act in a definite legal capacity, subject to a definite legal responsibility, and by the words referred to by the Solicitor-General he certainly had meant that the attorney to be employed should come within that definition.

“ Mr. ANSTEY said, that if the words ‘on behalf of’ were retained, he should not vote for the amendment.

“ The CHAIRMAN then put the clause, which, after repealing the provision contained in the Act of the 9th and 10th of Victoria, was in the following words: — ‘And that it shall be lawful for a person a party to the suit, or for an attorney of her Majesty’s Superior Courts at Westminster, retained by or on behalf of the party on

either side, or for a barrister to be retained by or on behalf of the party on either side, or, by leave of the Judge, any other person, to appear and address the Court, without any right of pre-audience or exclusive audience, but subject to such regulations as the Judge might from time to time direct.'

"Mr. CARDWELL wished, before the House came to a decision, to ask his honourable and learned friends opposite whether an attorney answering the description in the clause just read could possibly escape from an action for negligence in the misconduct of a cause?

"The SOLICITOR-GENERAL was of opinion that he could.

"Mr. CROWDER said, he had only assented to the proposition of the honourable member for Liverpool on the express ground that the person to be employed was to be either a barrister as a barrister, an attorney as an attorney, or any other person by leave of the Court. That was what he had assented to. It was not in the same form now, as it allowed an attorney to employ any other person, with whom he might have a secret partnership. He believed that by this clause the grossest frauds would be, as they had been, practised, and that the public would feel the greatest inconvenience from it.

"The honourable and learned gentleman declined to divide the House, but the gallery was cleared for a division on the objection of the honourable member for Youghal. No division, however, took place, and the clause of the honourable member for Liverpool was agreed to.

"The House then resumed, and the Chairman, having reported progress, obtained leave to sit again on Thursday next."—*Times*, July 10. 1831.

We have printed this long conversation, as showing that, so far as the House of Commons is concerned, all parties have assented to the principle of a direct communication between the client and the barrister. The circumstances alluded to by Mr. Crowder and others, our readers will probably agree with us, justify the alteration of the present rule of etiquette. It was said properly by Mr. Cardwell in the debate, "Repeal the rule, and then the Bar will review its own etiquette." This, no doubt, is putting the matter on its proper basis; and there can be no question that the Bar has the power thus to remedy the grievance which we have thought it right to bring before our readers. And although nothing was said in this debate on the subject more particularly before us,

yet it will be seen that statements were made by several honourable members that the attorneys had, in many cases, combined to exclude the Bar from the County Courts, and to take upon themselves the duty of advocacy. If this were done, it seems clear that barristers should be empowered to act as members of the other branch. Certain attorneys are held up by the Attorney-General as intending to destroy the Bar; and Mr. Crowder said that "he had received information of secret partnerships being formed between attorneys and attorney-advocates to divide the profits between them; and there had been instances in which combinations existed to prevent the Bar from being employed." A way, therefore, is clearly opened for altering this rule of etiquette.

Shall it then be altered? It is only for the Bar so to resolve, and it is obvious that they will be supported by the public. We shall, in a subsequent portion of this Number, show the steps that have been taken by a portion of the Bar to accomplish this important alteration¹; and our readers may thus be able to judge of the course there proposed. No one can doubt that it may be done, and effectually done.

Still we would pause a moment before the Bar acts on the feeling with which a portion of it is animated. We would rather say: Let all grievances be redressed on both sides, and continue the rules of the Profession as they now stand. Let the rank and practice of Barrister and Attorney be preserved each with its present forms, duties, and privileges, but do not let the one endeavour to usurp the functions of the other. Let those rules be remembered and acted on strictly which have gained for us the name of an Honourable Profession. Let it be the duty of each branch not only to respect, but to take means for insuring the maintenance of, the just rights of the other. This is the doctrine which, as the true friends of the whole Profession, we respectfully submit for the guidance as well of the Barrister as of the Attorney. The public, as appears by the debate, would care very little about the squabbles of the Profession. A portion of them, a short-sighted and narrow-minded portion though they be, would rather enjoy the sport. As somebody

¹ See *post*, Art. XII.

said, they would hope to come by their own, and if the Profession only was injured, this might not move the lay gentry: but the most valuable rights of all are perilled. It is not the privileges of either class of the Profession that we care about: the etiquette of the Bar, or the practice of the attorney, that may be now in danger; but these are as nothing to the general interests of the public, which may be materially injured by a change so great, and of which it is impossible to foresee the results.

These reasons, until we see our way more clearly, induce us to hope that no change will be made without much care. But this wish can only exist together with a determination to have every branch of the Profession placed on a proper footing: to have the Bar protected from injustice, and the public relieved from factious and interested opposition to measures which will place the administration of the Law on a sure and just foundation. The first object might be gained by placing a barrister's fees on the footing of other debts.

A worthy contemporary, which ably and closely represents the feeling and wishes of the attorneys, admitting the unpopularity of this branch of the Profession, recently instituted an inquiry as to its causes, and received many communications on the subject. This inquiry certainly showed great candour and even *naïveté*. The tenor of these Letters runs thus¹:—"Is it then to be wondered at that our name has become a bye-word and a reproach; and that any change—even to a County Court—is hailed as an improvement?" This being thus allowed to be the case, we would ask, is it wise that this unpopularity should be suffered to continue? We have endeavoured to ascertain the reason of this opinion, which certainly is the general one; and we trust we have shown how unwise it is to allow any real cause for it to remain. If we were enemies of the Profession, and more especially of the Attorneys, we should say to them, "Keep things as they are; let all go on as before; amend nothing: oppose all Law Reforms, especially those on which the hearts of the people are most set. Grasp all the business you can get—oppress and defraud the Bar as much as you can."

¹ See "Legal Observer," vol xli. pp. 114. 129. &c.

This is what we should say if we wished the destruction of the Attorneys; for the public attention is now fairly called to the subject; the day of class interests is gone; the House of Commons has shown that in settling professional rights it will look alone in this matter to the good of the community, which is admitted to be disgusted alike with the administration of the Law as with its Profession. It is just possible, therefore, that while the different branches are quarreling about their respective rights, Parliament may say of the TREE, "Cut it down, why cumbereth it the ground!"

Let every member of the Profession, and its well-wishers in particular, consider these things, and restore it to popularity by the mode we have pointed out, which we believe still to be possible. Let the Attorneys, more especially, consider who are their real friends — those who counsel them to oppose all amendments of the Law, or those who advise them to assist and promote them. Let them consider, and that quickly, not only their present state and condition, but how much worse it is likely to become if means are not taken to restore to them the confidence of the public. What has opposition to the amendment of the Law availed them? Point after point has been carried against them, and the rest must follow. Never was victory more complete than that of the Law-Reformers. The Anti-Law-Reform Policy has been tried, and with complete want of success. The more the Attorneys say that the public shall not have these reforms, the more determined are the public to have them. It will soon become a rule, if it is not one already, to insist on having what the Attorneys oppose. The Attorney, by general consent and by universal covenant, will be stripped of all the privileges that he now has. To reform the Law is now the settled wish of the community. If the Lawyers oppose it, the next point to be carried is the reform of the Legal Profession. The latter can be only preserved in its present position by assisting the public in obtaining the former. This, then, is the true policy of the Lawyer; and he is his real enemy who thinks and acts otherwise; and as to this we may conclude with Mr. Collier's observations on this point. As to the Superior Courts, he says:—

"If great alterations be not made, these tribunals must dwindle into comparative insignificance: a further extended jurisdiction must be given to the County Courts; their system of procedure adapted to the trial of important causes, their number increased, and the salaries of their Judges augmented.

"The local administration of justice which prevailed in very early times will be restored; a greater number of independent tribunals, not recognising each other's decisions, will be established throughout the country, presided over by men whose success at the Bar has at most been moderate, residing within their jurisdictions, and probably acquainted by hearsay from one side or other, with most important disputes before the trial of them, especially such as may arise between persons of distinction in their counties: uniform or authoritative decisions can scarcely be expected from such tribunals, and what is the law in Yorkshire may soon cease to be the law in Cornwall.

"A class of practitioners hitherto unknown in this country, being both barristers and attorneys, will arise, or Local Bars will be formed in which barristers will receive briefs without the intervention of attorneys; in either of which cases the division between the two branches of the Legal Profession will cease, which has hitherto been found so conducive to the interest of both, and of the Public. Among such a Bar it will soon be vain to look for Judges equal to those who now adorn Westminster Hall, or even for worthy successors to some who preside in the County Courts. And yet, if Burke was right in attaching so much importance to the constitution of juries, surely the formation of Judges is a matter which no statesman can afford to disregard." (Pp. 30, 31.)

Thus also says Mr. Morton:—

"I may be allowed to add, that the history of these County Courts ought to be a lesson to those who oppose timely reforms. Had the Superior Courts been made what they ought to have been—easy of access and speedy of decision—they would have retained their position in public esteem, and they would have retained their business, because they would have supplied the public wants; *now* we have three-fourths of the Common Law business of the country disposed of by gentlemen, who, however respectable, would occupy a very different position in Westminster Hall; and the English Bar—the most honourable, the highest in talents and character in the world—coming to a resolution that they will compete with attorneys for the business of these Courts!" (Pp. 13, 14.)

ART. II.—THE COURT OF BANKRUPTCY.

It is not in the power of the Legislature by any enactments to prevent the disappointment of commercial enterprise, to obviate the consequences of indiscretion, or to counteract the evils of fraud or misfortune. All that Parliament can be expected to do is to provide a proper tribunal to which debtors and creditors can respectively apply when commercial failure leads to insolvency.

And this Parliament has done. There are in Basinghall Street, five learned Commissioners, and twelve in the Country districts, each of them in his respective Court fully competent to discharge the judicial duties appertaining to his office. There is in each Court an elaborate machinery of messengers, official assignees, registrars, and clerks well qualified to take possession of and to distribute the property of bankrupts, according to the sound principle of a law well understood, while the Commissioners are ever ready to hear and to determine all questions which may arise as to the claimants to participate in the distribution. By these means the property of the fallen trader is preserved, his accounts are carefully investigated, the frauds of improper claimants prevented, the rights of honest creditors protected, the assets speedily distributed, and the costs of the whole proceeding strictly and conscientiously taxed. Finally, after all questions of accounts have been determined, a day is appointed when the "conduct of the Trader" is specially submitted to the judicial consideration of the Commissioner, and according to the result of an anxious and impartial inquiry, the trader either obtains his certificate of the first, second, or third class according to the circumstances of his failure, or he is prevented from again embarking in trade either wholly or for such length of time as the facts of the case may warrant.

In this picture of the Courts of Bankruptcy, in which

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nothing is exaggerated, we find a course of proceeding to which, in *theory*, nothing can be objected. Yet, notwithstanding, the existence of a tribunal to which debtors and creditors alike may seem to look with confidence, we find, in defiance of our theories, that in *practice* there exists ANOTHER TRIBUNAL—the *Rival of the Courts of Bankruptcy*, which, in effect, absorbs the administration of nearly all the heavy and most important cases of commercial failure; and this happens too, although this “rival tribunal” possesses none of the appliances which belong to the Courts of Bankruptcy, and is, on the contrary, beset with evils of the most pernicious character.

By this word “rival tribunal” we allude to the system of *private arrangement* between debtors and creditors, conducted in the private offices of solicitors. In some of these arrangements assignments are made by the debtors to trustees, chosen either by themselves or by the creditors, in others, the debtors are permitted by what is called “a letter of licence,” to conduct their business either with or without the control of Inspectors, a certain time being allowed to them to pay the whole or a part of their debts. In neither of these plans is there any security given to the *bonâ fide* creditor against the dishonesty of debtors—the fraudulent claims of pretended creditors—the wasteful expenditure or final failure of the debtors or of the trustees, or the extravagant claims of accountants, auctioneers, and solicitors. The creditors have voluntarily constituted a tribunal which they too frequently discover has no jurisdiction to correct or punish the fraudulent concealment of property, to detect the errors of accounts, to prevent the claims of the relatives or friends of the trader, to expedite the payment of a dividend, to guard against the failure or the frauds of the trustee, or to limit the expenses of the administration of the estate.

These views of the results of private arrangements are familiar to the minds of all practical men, and their truth is not to be countervailed by the assertion, no less true, that in many cases of private arrangements, the debtors are trustworthy, the creditors are all honest, and the solicitors, auctioneers, and accountants moderate and reasonable in

their charges. If all men were honest, we should have no occasion for laws to guard against knavery.

A few years ago the commercial interests of this country suffered a very alarming shock, and several mercantile houses of great eminence and great apparent respectability were compelled to stop payment. It was during the shock of that calamitous period a topic of general remark, that very few indeed of these unfortunate traders, having large masses of creditors still more unfortunate, were made subject to the Laws of Bankruptcy, but that the majority of them, and their respective creditors, met at the offices of their solicitor, and there effected private arrangements. It would be desirable to ascertain what have been the practical results to the debtor and creditor respectively, comparing the cases of those who have passed through the Courts of Bankruptcy with those which have been administered under the rival system. In the former the property of the traders has been taken possession of, accounts have been rendered, debts have been proved under the judicial authority of the Commissioners, the costs carefully taxed, and after paying all proper expenses, the balance was in every instance within two or three months divided amongst the creditors. We know of a certainty that nothing has been kept back, that no fraudulent claim of debt has been allowed; we can tell to a shilling what the expenses have been, and for what purposes they were incurred. So much for the cases which have been administered in Bankruptcy. But what can any one know about the proceedings under the other—the rival tribunal, if there be persons engaged therein, who shall find it convenient to conceal anything or everything connected with any particular case? Let us suppose a creditor to be dissatisfied with a claim made by a near relative or intimate friend of the trader, with any waste of property, any improvidence in the management of the estate, any extravagance in charges, or with any vexatious delay in the payment of the dividend. To what commissioner or other sufficient authority can he go, and without formality or delay explain his suspicions respecting the conduct of the trader, the trustee, the creditor holding property, or the claimant who shall seek to

prove a debt against the estate, with a certainty of having an opportunity afforded to him of investigating the grounds of his suspicions? The only tribunal open to him is the Court of Chancery, and any suggestion that he should refer his complaints to that tribunal would only be adding mockery to the grievances which he has either suffered or suspected.

In the "Consolidation Act of 1849," some provisions were enacted respecting private arrangements, from which an intention on the part of the Legislature might be inferred, of submitting such proceedings generally to the control of the Courts of Bankruptcy; but if this object had ever been contemplated, the machinery of the statute is undoubtedly very inadequate to its attainment.

These provisions will be found in the 224th and five following sections of the Act; but they, in no respect meet any of the mischiefs which we have been enumerating as belonging specially to private arrangements not within the control of the Court.

The 224th section provides that "every deed of arrangement now or hereafter entered into between any trader and his creditors, and signed by six-sevenths in number and value of the creditors whose debts amount to ten pounds, and upwards, shall (subject to certain conditions) be binding upon all creditors who have not signed the deed;" but (§ 225) "not until after the expiration of three months from the time at which such creditors shall have had notice from the trader of his suspension of payment *and* of the deed of arrangement; unless the trader shall within such three months obtain from the Court of Bankruptcy an order or certificate declaring that the deed of arrangement has been duly signed by such majority of the creditors, as aforesaid." This order, or certificate, is to be obtained upon the petition of the trader only, which requires a stamp of ten pounds, and a fortnight's notice is to be given of the application for the order or certificate to every creditor who has not signed the deed. The two next sections, 226 and 227, require a certificate from the trustees or inspectors, if there be any, and if there be no trustees or inspectors, from two of the creditors, that the deed has been duly signed by the required number

of the creditors. And the order, or certificate, when granted by the Court, is to be accompanied by a full schedule of the debts of the trader, with a correct list of all the creditors, with their names, residences, and occupations. The 228th section regulates the proofs of debts and other matters of detail, and then the 229th section declares that if any trader shall be desirous of showing to the Court that his estate has not been duly administered in conformity with the deed of arrangement, it shall be lawful for him to make affidavit of the facts, and the Court shall thereupon inquire into the matter, and make such order as shall be just.

The introduction of these provisions would seem to evince an opinion on the part of the framers of the statute that some protection should be extended to the system of private arrangements; but the Legislature has not gone far enough, and we look in vain for any means whereby a *creditor* who has actually signed a deed can secure himself against any of the mischiefs which have been already specified. These provisions, ineffectual as they are, can be brought into action only in cases wherein the trader and the trustees concur in bringing the particular act of arrangement under the protecting power of the Court of Bankruptcy. The Court cannot interfere at all if the trader shall refuse to petition, or if the trustees shall think fit to withhold the certificate required by the statute.

The principles of the Courts of Bankruptcy, and the system of "private arrangement," being thus presented to the public eye in such glaring contrast, there must exist some causes of a very influential character to lead to a result so extraordinary as that the Courts of Bankruptcy, which appear in theory to be most deserving of general estimation, should, in practice, be postponed to a system of private arrangement, wherein almost every disadvantage to creditors seems to be accumulated. Many persons have turned their attention to the subject, and several causes have been assigned to account for a result so pernicious to the best interests of the commercial world. All have agreed that much benefit would accrue to society if any means could be devised for relieving the Courts of Bankruptcy from any prejudice which

prevents traders, whether debtors or creditors, from looking to them with confidence as the best arbiters of their differences, and the most safe and efficient administrators of their property.

Some persons ascribe the unpopularity of the Courts of Bankruptcy to the *expense* incurred therein in the administration of a debtor's estate, and this point is no doubt well deserving of attention. The expenses principally referred to are the heavy stamp duty, which must be paid at the very outset of the proceedings,—the allowance made to the official assignees, — and the solicitor's costs. The first is the only one to which any reasonable objection can be urged ; and undoubtedly the payment of ten pounds upon presenting a petition for adjudication, or for arrangement by deed, is sufficient to deter many persons, either debtors or creditors, from taking the first step, which by possibility may not lead to any useful results. People do not like to advance the sum of ten pounds upon a speculation, in its nature doubtful or uncertain, and which under all circumstances must fall upon the creditors. To this point we beg respectfully to direct the attention of the Legislature, and earnestly hope that no time may be lost in relieving the proceedings in Bankruptcy from such a burden. The other matters of expense, if fairly considered, ought not to operate in the public mind against the system of bankruptcy. The allowance to the official assignees, although incorrectly called a "per-centage," is only in some degree regulated by the amount of assets collected by these most useful officers. It is granted to them under the careful supervision of the Commissioners, and is, in many instances, a very inadequate reward for their laborious and assiduous duties. Those persons who attribute much importance to this point have had no experience of the heavy expenses which are incurred in private arrangements not under the control of the Court, and they certainly know nothing about the nature of the labour bestowed by official assignees in collecting debts and other assets of the bankrupts,

¹ The allowance to an official assignee, under Lord Brougham's order, is 1 per cent. on the amount received, and $1\frac{1}{2}$ on money actually to be divided. This is subject to be varied according to circumstances.

and in examining the accounts of the traders, and the claims of the creditors. They also overlook the consideration that this branch of the system offers to the creditors the best security that their interests will be duly protected, and their dividends be honestly and speedily paid. This point of expense, therefore, offers no satisfactory reason why private arrangements should be preferred to the Court of Bankruptcy; and with respect to the solicitor's costs, it is a sufficient answer to this point to say that these costs are all carefully taxed, whereas under "the rival system," there is no taxation of solicitors' bills, nor any check upon the charges made by accountants and auctioneers.

Another cause assigned for the unpopularity of the Courts of Bankruptcy is the *publicity* given by newspapers to the proceedings which there take place. But this circumstance, if fairly considered, will be found to be no less futile than the other. In the first place, the Act of Parliament provides means whereby a trader may, with the concurrence of a certain number of his creditors, effect private arrangements under the control of the Court (see sections 211. *et seqq.*), to which no publicity whatever is attached. Yet very few persons have taken advantage of these provisions. This circumstance alone supplies a sufficient answer to this objection of too much publicity. But even in the case of an ordinary bankruptcy the mere apprehension of publicity which operates often upon creditors as well as debtors, cannot account for the unwillingness of traders to seek the jurisdiction and protection of these Courts. Debtors unquestionably do not like to have their names exhibited in the Gazette and newspapers as Bankrupts. But they do not escape publicity as Insolvent traders by having recourse to the system of private arrangements. Every important failure, although not followed by a Bankruptcy, is duly announced in all the newspapers; and, in many instances, even the balance sheets of the fallen houses, in all their flagrant deception, are soon afterwards exhibited in the same columns. There is little more publicity than this given in the Court of Bankruptcy before the day appointed for considering the allowance of the certificate. The petition for adjudication, and the adjudi-

cation thereon, are, in their nature, essentially private. And if the debtor shall take advantage of the right to show cause against the adjudication within the seven days allowed to him for that purpose by the Statute, the matter is heard in a private room by the Commissioners. If the adjudication be confirmed, or if no cause be shown against it, the name of the bankrupt will then be announced in the Gazette, and copied into the newspapers, and certain days be appointed for proofs of debts, choice of assignees, and examination of the bankrupt. To these proceedings public attention is very seldom invited. The accounts of the bankrupt are prepared in private, and are, for the most part, tested in private by the official and trade assignees: and if the accounts are found to be correct, and the property fairly and honestly accounted for, there is little or no publicity given to the passing of the "last examination." If the balance sheet shall, by the active zeal of a reporter, the desire of the bankrupt's solicitor, or the excusable ambition of the accountant, appear in a newspaper, it will have this advantage over some of the balance sheets which have been given to the world in some great failures under private arrangements, namely, that it will most probably be honest and correct.

We shall now, however, approach some other matters which are essential in the system of public bankruptcy, and to which we earnestly invite the attention of all persons who feel an interest in the administration of this most important branch of our commercial law, for we are deeply impressed with an opinion that in these matters we shall discover some solution of the difficulty, and why the Courts of Bankruptcy are not popular.

Prior to the passing of the Act 5 & 6 Vict. c. 122. the creditors alone had the power of granting or of withholding the certificate of a Bankrupt, upon the principle, no doubt, that nothing less than the expressed consent of a considerable proportion of the creditors should deprive them of the ultimate chance of having their debts paid. Experience, however, proved that this system was attended, in many instances, by frauds in the proofs of debts, and in preferences to favoured or hostile creditors, which must have been sustained by perjury. The Legislature, consequently, thought fit to take

away from creditors altogether this power, and to give it exclusively to a Commissioner, accompanied, however, by a right of appeal from his judgment on the part both of the creditors and of the Bankrupt to the Vice-Chancellor sitting in Bankruptcy. But although there have been several instances of such appeals, some of which have been prosecuted successfully; yet we know that such proceedings are attended with so much trouble, anxiety, and expense, that many individuals are in practice deterred from adopting them. We ought, therefore, to look to some means of obtaining for the public judgments of so high and commanding a character as will in practice supersede the necessity of appeals.

There are at present, as already mentioned, Five Commissioners of Bankruptcy sitting in Basinghall Street, and twelve in the country districts; all holding separate and distinct Courts; all governed, no doubt, by the same law, but subject in only some few matters, expressly limited by Statute, to the revision of any Court of Appeal. No one who is acquainted with the practice of these Commissioners, can for one moment question their talents, industry, and impartiality; yet in consequence of their being so isolated in their several Courts, and of the expense and difficulty of appealing from their Judgments in cases of disputed adjudications and of disputed certificates, there have arisen great complaints of a want of uniformity in the principles which govern their decisions; nor in cases of Certificates can this be a matter of much surprise, or of any reproach to the Commissioners respectively, when we consider the nature of their jurisdiction. They are required by the statute to inquire into the "conduct of the bankrupt as a trader."

This word "conduct" is a phrase of very indefinite signification, and gives an ample latitude to each Commissioner to apply to the acts of the bankrupt all tests, legal, equitable, moral, commercial, and social, which can accrue to the mind of each Judge.

It is obvious that, in the scrutiny of any man's career, facts and circumstances must occur on which it cannot be expected that any five, or, still more, that any seventeen persons, can think alike, especially where the points under discussion do not depend upon the strict terms of a defined law. We find,

by every day's experience, how differently the occurrences of life are viewed by different persons, according to the tone and habit of mind of each respectively. Judges of the Supreme Courts of Law and Equity, and Juries, even the most respectable, constantly differ among themselves in estimating the importance of facts, and in applying them, when ascertained, to the principles of law, even when the law itself is clear. It would be invidious to particularise some points, on which there exists a marked diversity between the opinions of the several Commissioners; and, therefore, we abstain from noticing them. The question may be permitted to rest upon the acknowledged certainty that diversities of opinion must of necessity prevail among so many Judges. The importance and weight which must attach to the judgments delivered by the several Commissioners cannot be estimated too highly. The Courts of Bankruptcy are the principal, if not the only Courts of Commerce in the country; and from these are to flow the principles upon which the whole of our internal trade ought to be conducted. Their judgments are not to be rated solely by a reference to the fate or fortune of the individual traders who may be the immediate subjects of them; but by their bearing and influence upon the conduct of thousands who are still pursuing their commercial avocations. In most other Courts, where only one Judge presides, he is either assisted by a jury in matters of fact, or he is governed in matters of law by the reported judgments of his own or of other Courts. He is relieved by the consciousness that there is an appeal from his judgment, or he possibly may be assisted or controlled by the presence of a permanent and watchful Bar, who preserve the memory and secure the influence of certain well-known traditional principles on which the Court has uniformly acted. These several circumstances either do not exist at all in the Courts of Bankruptcy, or are to be found in a degree far too limited to be capable of exercising any control over the judgments of the Commissioners. Let it be remembered, too, that even with respect to the Superior Courts of Law at Westminster, the dictum of one Judge, however eminent, never obtains the same degree of reverence and consideration as are attached to a judgment of

the full Court. Can it then be a matter of surprise or of reproach that in bankruptcy the opinion of only one Commissioner, however estimable he may be, should not command the same degree of public confidence as if it had emanated from a Court consisting of three, or even of two Commissioners? Can it be surprising that a trader should be unwilling to submit his character and future prospects in life to the judgment of any one man, or that the creditors should be reluctant to accept it as the future rule of their commercial conduct?

Pressed by these considerations, and knowing well that they are very generally felt, as well throughout the profession as by merchants and traders of eminence, and even by some of the Commissioners themselves, we propose, as a means of restoring to the Courts of Bankruptcy that degree of public confidence without which this branch of our judicature cannot operate with advantage, that in all cases of disputed adjudications, disputed proofs of debts, and of certificates, a Court should be formed in London of three Commissioners; and in country districts of two Commissioners or Judges, to which alone all such questions should be submitted. We further propose, with a view of giving additional weight and dignity to the proceedings of this Court so constituted in London, that barristers alone receiving their instructions from solicitors of the Court, according to the established etiquette of the profession, should be permitted to practise before it. A permanent Bar would, by such means, be formed to assist the Court by their learning and experience, and control it by their watchfulness and presence.

We firmly believe that if a tribunal of this nature were established, possessing the forms and appliances of a High Court of Justice, such a degree of confidence would be created in the public mind, that creditors and debtors alike would prefer it to any system of private arrangement. All other matters in bankruptcy might proceed, as they now do, before a single Commissioner, where solicitors might practise as they do at present. Previous to the passing of the last statute there existed a power of forming Subdivision Courts of three Commissioners in London, to which certain matters were

referred by any one of the Commissioners who required such assistance; and no portion of the system worked better or more satisfactorily. The suitors in bankruptcy felt so much confidence in the Subdivision Courts, that we believe no appeal was ever made from their judgments, and to the Commissioners themselves the institution was a source of great comfort and consolation. It afforded them an opportunity of weighing and of interchanging their opinions. Consistency in their judgments was thereby maintained; and none regretted more than they did the change of this portion of the law. We have reason to feel assured that they too would rejoice in the establishment of the Superior Court which is now suggested; and no one can doubt that it would relieve the Court of Appeal in Chancery from much, if not from all, the business arising out of matters in bankruptcy.

The mode of forming the Court in London would be a simple matter of detail, not difficult of arrangement. The senior Commissioners ought always to preside; and to enable him to devote his time to this and to other matters which especially appertain to his jurisdiction, it would be proper to relieve him from the ordinary duties of a single Commissioner. It would, moreover, be proper that he should bear the title of "Judge in Bankruptcy." It would also be expedient that the Commissioners to whom the particular case under discussion had been allotted should be a member of the Court, and the third Commissioner might either be chosen by ballot, or be selected by the other two.

A similar facility of constituting a Court of two members exists in those country districts where two Commissioners are established; and where there is only one Commissioner appointed for a country district, he might be assisted either by a neighbouring Commissioner, or by the Judge of a County Court within the district.

Besides this important amendment of the Law, there are also some other matters connected with the proceedings in Bankruptcy in which we think much improvement might be made, and which in their present state operate injuriously to the interests of Debtors and Creditors.

It is desirable that every encouragement should be held out to traders in falling circumstances to declare themselves

insolvent, or to be made bankrupt, while they yet have some property left to give up to their creditors. This principle is recognised in our law at present by the very liberal allowance given to bankrupts, in proportion to the dividends paid to the creditors; yet, notwithstanding this, we still find debtors so unwilling to fall under the Courts of Bankruptcy, that in many instances they continue a hopeless struggle until every chance is tried in vain, and all their property exhausted. It is certain that they do not evince an equal reluctance to meet their creditors in private arrangements, and to assign their property to trustees; but to this expedient they cannot have recourse unless they can induce all their creditors to concur in the arrangement. We have already alluded to matters respecting the allowance of certificates, as accounting in some degree for this unwillingness to adopt the course of bankruptcy; but there are other circumstances which also contribute to it. No one who has had any experience in the manner in which a trader is generally treated by the majority of his creditors in private settlements, as contrasted with the harshness that he experiences in bankruptcy, can wonder that a trader should in general prefer the private to the more public mode of arrangement. In the one he meets for the most part with forbearance and consideration; his feelings, as well as his domestic comforts, are more respected: while, on the other, the strong arm of the law fells him at once to the earth, making no distinction between integrity and dishonesty. There is something inexpressibly shocking to the mind of a respectable trader in the sudden and harsh dissolution of all his domestic habits. His hearth is rudely invaded, his furniture is torn from him, and his family are turned out of doors to seek shelter wherever they can find it. In this, too, as in many matters connected with bankruptcy, there exist much uncertainty and inconsistency. Some of the messengers discharge their duty with gentleness and forbearance; others have been known to search the persons of the bankrupts and of their families under circumstances of revolting and unnecessary severity. The rule is, to seize upon every thing. The furniture, which is generally the last thing taken away in private

arrangements, is the first item of property disposed of in bankruptcy. A bankrupt cannot preserve the use of a single article of furniture for himself and family, unless he can in his destitution find some benevolent friend who will mercifully purchase it from the assignees. There are no "excepted articles" secured to him by the law, as are allowed to a debtor in cases of insolvency, and what he may retain as his "necessary wearing apparel," within the terms of the clause, for his surrender, must be determined by himself at his last examination under the peril of an indictment for felony.

Now all this display of cruel and relentless activity may be avoided without doing any injury to the creditors. When a trader is adjudicated a bankrupt, if he be an honest man, and shall seek for any indulgence, he will immediately give up to the official assignee all his stock in trade, with all his books and papers, and furnish a statement of whatever property he possesses which might be made available for his creditors. The messenger should cause an inventory and valuation to be made of the furniture, and the Commissioner should, according to the circumstances of each case, be invested with ample powers to suspend the sale of such property, to leave it to the use of the bankrupt and his family, and to give orders from time to time respecting it, or any portion of it, as he may think expedient. Should the bankrupt eventually become entitled to an allowance under the statute, he should have the power of electing whether he would take the money and let the furniture be sold for the benefit of the creditors, or take the furniture at the valuation originally put upon it at the time of the adjudication. The furniture having been valued, and being capable of being identified at all times, must be considered as belonging to the estate subject to the order of the Commissioners, either to be sold, if necessary, for the benefit of the creditors, or to be given back to the bankrupt as a portion of his statutory allowance, if the state of his affairs shall show him to be entitled to it.

There are several other matters, but of minor importance, in which some alterations might be effected with advantage; but it would swell this paper to an inconvenient length if

they were now to be specially noticed. Those which appear to demand the earliest attention have been mentioned; but, beyond every thing, we ought to seek the most effective means of promoting and establishing consistency and uniformity.

The spirit, bearing, and efficacy of a law are to be found more in its mode of administration than in its form and language; but no law will ever act well, or inspire general confidence, unless we can secure the presence of these great and primary qualities — uniformity in judgment, and consistency in practice.

ART. III.—EQUITY JURISDICTION IN COUNTY COURTS.

AMONG the bills introduced last Session by Lord Brougham for the Reform of the Law, the measure which forms the subject of this Article was by far the most valuable and important. It was postponed (owing to the late period of the Session, and the threatened opposition of certain Law Lords) with an intimation that it would be again introduced when Parliament shall meet again.

Public opinion — of which the current has at last set in decidedly in favour of large measures of Law Reform — will make it impossible for sinister interests effectually to defeat the plans of the Noble and Learned Lord.

But — as humble coadjutors in the same cause — we trust we shall, nevertheless, be rendering some service by placing before the public a plain and popular explanation of the reasons which render the measure alluded to essential alike to the establishment of a sound system of Law, and to the promotion of the general welfare of the community.

The Court of Chancery has become more unpopular, indeed we may say more odious, than any other tribunal in the country. Nor is the unfavourable character it has earned of modern origin. For centuries the ruinous costs it inflicts on

suitors, and the interminable delays by which it stifles justice, have been the theme of the satirist's wit and of the patriot's indignation. So monstrous are the grievances that this Court creates — so flagrant and so complicated are the abuses of which it is the source — that a true picture would be calculated to excite incredulity, were it not for the reiterated discussions and the concurrent authority of the most eminent and well-informed members of the Legal Profession, which have long since placed beyond the reach of doubt or suspicion the leading facts on which the charges against the English Chancery system have been founded. But notwithstanding the existing state of public opinion on this subject, we think it clear, nevertheless, that the full extent and actual nature of Chancery abuses have not even yet been fully understood, or adequately appreciated.

There are two ways in which the English Chancery system is productive of those grievances which it inflicts on the community: —

1. Its expenses and delays are commonly ruinous to those who become suitors.

2. Those expenses and delays make it impossible, generally speaking, for parties aggrieved to commence suits in Chancery at all, and commonly compel absolute submission to injuries of that class for which that Court alone professes to afford redress.

It is the former branch of the characteristic grievances of this jurisdiction to which public attention has been chiefly directed. And naturally so, because the cases which belong to that branch have assumed a public character, from the investigation they have undergone in open Court, the inquiries to which they have been subjected in the various subordinate offices in Chancery, and the costs to which they have ultimately led — incidents all eminently susceptible of striking and popular delineation.

As already intimated, we do not think that there has been any exaggeration in the generally received description of Chancery abuses. But we consider it certain that those descriptions have been imperfect, and, in a practical sense, fallacious; because, confined to those of the first, to the ex-

clusion of those which fall under the second of the heads above enumerated.

Great as have been the misfortunes endured by those who (having entered the Court of Chancery in search of Justice) have found their hopes baffled by costs and chicanery, we consider, nevertheless, that a greater amount of injury has been inflicted on those who have been entirely deterred by the constitution of that Court from the prosecution of just claims, over which it possesses exclusive jurisdiction.

Local Courts, for the recovery of Common Law debts up to 20*l.*, have now been in existence in this country for a period of four years and a half; and they have recently been extended to the limit of 50*l.* It is all but superfluous to remind our readers of these facts, or to add, that by general consent, these Courts have afforded a great boon to the community, and a triumphant example of the benefits of new and more enlightened principles of jurisprudence. Even to the great majority of those who were originally most deeply imbued with prejudices against these tribunals, it is now a matter of surprise that so simple a mode of redress should have been withheld so long; and to all enlightened men it appears extraordinary that, in a country boasting of its freedom and intelligence, the plainest claims should have been practically irrecoverable; and the rights of credit, as a general rule, essentially placed out of the pale of the Law.

But notwithstanding the magnitude of those defects in our laws — which the County Courts have removed — we are of opinion that the grievances arising from the Chancery system are of even greater magnitude still. On this subject we must be allowed to explain succinctly the grounds of the conclusion we have just expressed — a conclusion to which we shall (as we anticipate) have no difficulty in procuring the assent of the reflecting and well informed. We are fully sensible that were the means of redress in Chancery cases made as cheap and accessible as they are in the County Courts, the number of cases of the former class would by no means be equally numerous with the present County Courts' actions. Undoubtedly there would be a very great increase

of Chancery suits, in comparison to the number which now are brought before the existing Chancery Courts. Still even under a system of procedure — rendering redress equally cheap in each instance — suits founded on matters within the Chancery jurisdiction would necessarily be fewer in number than suits originating in Common Law debts, because the number of transactions of the latter class is far greater: for example, Trusts, Executorships, and Charities, are of rare occurrence compared to Common Law debts, which, in the single branch of tradesmen's accounts are all but innumerable. But the number of cases — or even the actual amounts they involve — do not form a criterion of the relative importance of the class to which they belong.

It is a momentous consideration, that the Court of Chancery has exclusive cognisance of rights that most deeply affect the public interests and the general well-being and happiness of families, such as Charities, Trusts, Executorships (heads already enumerated), cases of Lunacy, &c. This Court, in fact, is the professed guide and guardian of all who, from infirmity of mind, infancy, &c., are unfit to protect themselves — the especial source of redress in cases of fraud, &c.

Notwithstanding its present well-deserved unpopularity, there can be no doubt — historically speaking — that the Court of Chancery originally owed its existence to good intentions and enlightened views on the part of the English Kings of old. To the legal reader we need hardly remark, that the Chancellor was in the first instance the special representative of the Sovereign, appointed by him to afford redress against the defects and hardships of the Law, in conformity to the dictates of natural Equity. Hence it is, that, some of the most delicate relations of life, and some of the most important classes of family transactions, belong to the Chancery Jurisdiction. We may infer from the nature of his duties, as the dispenser of natural justice, in obedience to the benevolent desire of a Royal Master, that among the leading features of the Court of the Chancellor of primitive times, were those characteristics which are so peculiarly wanting in the tribunals of his successors — viz., *cheapness and accessibility*! To restore those features, to the fullest possible extent, is indis-

pensable, in order to render the Chancery system conformable, either to its original intention, or to its purposes in the present age. A few observations will make this proposition clear.

We have already intimated that transactions cognisable in Chancery, though comparatively few in number, are commonly of vital importance to the welfare of individuals and of society. If a tradesman loses a debt from want of means of redress, (a common occurrence previously to the passing of the County Courts Act,) the grievance, though undeniable, was one chiefly affecting the personal interest of the creditor, and the consequence of his own act in giving credit. But who can estimate the injuries inflicted by breaches of trusts, which frequently deprive entire families of the means, not only of support, but of education, religious, moral and secular! Or who can measure the loss sustained by the entire people of this country by the fraudulent diversion of charities from their purpose of supplying instruction to the youth of each successive generation.

As the disasters produced in such cases are of unusual magnitude, it is in the same degree important that the means of redress should be facile, prompt, efficient, and accessible. This object cannot, in our opinion, be attained except through the medium of Tribunals as economical as regards costs, and as simple in their procedure as those established by the County Courts Act. To those who would object to our views, on the grounds of ancient authority and precedent, we may state that these are by no means favourable to such objections. The ancient Local Courts of the country, such as Recorder's Courts, have commonly unlimited jurisdictions, which the present County Courts also possess in Insolvent Cases connected with a previous imprisonment.

Professing, however, to be influenced ourselves by reason and common sense, rather than by precedent, we shall pass to the discussion of considerations of a different nature.

It seems to be assumed by the defenders of costly tribunals that the necessity for cheap Courts depends solely on the smallness of the amounts sued for, and that claims of magni-

tude admit of redress by means of expensive tribunals. It is difficult to conceive a proposition that will appear, when closely examined, more at variance with sound sense. It is obvious that it is not the amount of his claim, but the amount of his existing resources, on which depends the power of a suitor to bring his case before a costly Jurisdiction. A person utterly destitute may have a just claim for ten thousand pounds; while, on the other hand, a commercial man with several thousand pounds of capital at his disposal (and this is an ordinary case) may be entering every month plaints for a few pounds in the County Courts against his customers.

Nay, further, it is commonly true, that the destitution of a claimant has been rendered more complete by the magnitude of his losses—by the enormous sums which have been wrung or withheld from him by some fraudulent person.

We have made these remarks because they will be found to have a particular application to transactions that fall within the province of Chancery. To take the following familiar examples.

An executor abuses the confidence reposed in him — embezzles the fund entrusted to him — permits an infant family to grow up ignorant and neglected. Thus the children of a man, who perhaps belonged to the higher or middle classes of society, are allowed to sink into the rank of labourers. Pains are taken to conceal from them the frauds of which they have been victims, and the contents of the Will. Eventually these artifices are discovered or suspected by one of the persons aggrieved. But what means has he of paying the costs of a suit more than the poorest plaintiff who sues in the County Courts for a few pounds of wages?

A Local Charity, destined by its founder to educate the youth of a parish, is entirely misappropriated by the trustee of the funds which we will assume to amount to 20,000*l*. A patriotic inhabitant of the district desires to obtain reparation. But, according to the very nature of the case, the individual who has been guilty of the fraudulent misappropriation is for that reason in possession of large funds for litigation; on the other hand, his opponent may be destitute of money, while at

the same time he has little or no pecuniary interest in the result.

It is a natural consequence of fiduciary relations, that when they are abused, the victims are commonly placed in a condition that renders them helpless, unless cheap and accessible tribunals are provided for their protection.

Now it is, we think, a necessary sequence from this conclusion, that large and extensive Jurisdiction must be given in such cases to Local Tribunals. No Court but a Local Court can ever be made sufficiently cheap and accessible to fulfil the desired end of affording protection and redress to the poor, the ignorant, the young, and the helpless. To all such, a Metropolitan Court is a dead letter.

Of course we are familiar with the common excuse, or rather palliation, usually suggested for this state of things ; viz. that solicitors are generally willing to take up, at their own expense and risk, cases in which there is a clear right to redress. But this assumption forms a fallacious vindication of a system intrinsically and flagrantly unjust. We believe it to be entirely at variance with the received etiquette of respectable solicitors to take up a case on their own pecuniary responsibility. To act on the principle of "No cure no pay" (to use the popular phrase) is considered characteristic of practitioners of a lower grade. When individuals of that class do enter into such bargains, they generally contrive, either by imposing exorbitant terms in the first instance, or by frauds and artifices afterwards, to appropriate to themselves the lion's share of the proceeds of a suit. This, we may observe, is a common result of suits instituted by men in humble or embarrassed circumstances, who are frequently induced to place their affairs in the hands of disreputable solicitors, through ignorance of the characters of those in whom they may thus confide.

Among respectable country solicitors there is, we believe, a growing disinclination to embark in Chancery Suits, on account of the manner in which the proceedings are conducted, and the mode in which their agents' charges exclude them from a fair chance of profit.

The preceding remarks imply the conclusion on our part

that, any changes which may be proposed by the eminent persons who have been for some time employed in investigating the state of the Chancery Jurisdiction (with the view to an improvement of its practice and procedure), will be inadequate to meet the exigencies of the case. Such changes may doubtless serve greatly to lessen the present standard of costs, and to mitigate the aspect of present deformities.

But the difficulty will still remain (and it is entirely insuperable by any changes of detail), viz. How can the requisite degree of cheapness be given to a system of Centralization which compels suitors (and even their attorneys in country cases) to employ London solicitors and counsel in Courts in other respects full of risk and exposure.

The Court of Chancery involves so many untenable principles, that it is not susceptible of being permanently preserved as a separate tribunal. On the other hand, there are features in the system of County Courts that will be found to render their progress and final ascendancy (subject to a power of appeal) absolutely inevitable.

For example, the opinion of all enlightened jurists both in this country and in America has been made up as to the fallacy and mischief of maintaining an Equity or Chancery Jurisdiction separate from that of the Common Law. Public opinion has of late loudly responded to this conclusion. The question then arises, how is the fusion of Jurisdictions to be effected? The course which in the first instance suggests itself as a natural one, is to give Equity Jurisdiction to the Common Law Courts in cases above 50*l.* and to the County Courts in those below 50*l.* But there are difficulties of a practical nature which render it impossible for the Superior Courts of Common Law to perform the functions of Equity tribunals.

The most common class of Equity cases, such as those relating to partnerships, the administration of assets, &c., generally involve long and complicated transactions, quite incapable of being disposed of at a single hearing, and perfectly unfit for the decision of a jury. The series of inquiries to which such cases give rise, are, therefore, unfit

to be the subject of trials at assizes, held only in one place in each county, and at intervals of half a year.

Such cases can be dealt with only by tribunals like the County Courts, which are either stationary, or repeatedly visit the same spot at short intervals.

Any attempt to accommodate the Superior Courts of Common Law to the requisitions of Equity business, by rendering their sittings more frequent, and by holding those Courts in a greater number of places in each county, would be a practical fallacy, for it would be tantamount to converting them into County Courts, with all the expenses (immensely increased by additional journeys and sittings) of Superior Courts.

Again, the system of written evidence in the Court of Chancery has received universal condemnation. But there is no mode of introducing the practice of oral examination, consistently with the preservation of the exclusively Metropolitan system of Chancery. The idea of bringing up Chancery witnesses to be examined in London has never been even suggested, for it is obviously inadmissible, not only on account of the expense as regards the witnesses, but also because the time required to examine them would render it indispensable largely to increase the number of Judges in Chancery.

At the same time, it is self-evident, that witnesses in such cases may be most advantageously examined in the County Courts which are at their own doors.

The preceding remarks will, we believe, serve fully to demonstrate the necessity of Lord Brougham's Bill for giving Original Equity Jurisdiction to the County Courts. We may here point out, that there are some functions which obviously should be transferred to the County Courts without delay in all Chancery cases whatever. We allude to the examination of the parties and their witnesses.

Against this change, it will be impossible, as we believe, for prejudice or self-interest to suggest even a plausible objection. Whatever cavils may be urged against withdrawing from the present Chancery Judges a part of their jurisdiction, and transferring it to the County Courts would, in

this instance, be inapplicable. Neither the parties nor their witnesses are at present examined by the Chancery Judges themselves, nor by any competent tribunal whatever, and (as already intimated) the mode in which evidence in Chancery is taken, forms the subject of condemnation with all enlightened men. To transfer the duties to which we have just alluded, to the County Courts, or to any other tribunal presided over by Judges of professional qualifications, would obviously be a clear, unmixed gain. Moreover, as we have already intimated, this proposition involves the only practicable mode by which the vicious system of written evidence in Chancery can be got rid of.

Here we may remark, that Lord Brougham's Act for rendering the evidence of parties admissible in all courts, must practically remain a dead letter in Chancery matters, in the absence of the change we have last indicated. It is also highly deserving of remark that there is no other class of public functionaries so eminently qualified by experience to conduct the examination of the parties to a suit as the Judges of the County Courts, who have been accustomed to deal with that species of evidence since the first establishment of their jurisdiction more than four years since.

We have no doubt, that the most beneficial results will be found to follow from the change now particularly under discussion; as an oral examination in open Court will frequently be decisive of the merits of a case against a fraudulent defendant, who might baffle the written interrogatories of a bill.

We should propose to give to the plaintiff in Chancery the option, either of obtaining the defendant's answer by a bill, as at present, or by an oral examination in the County Courts, as he may think proper.

The social evils we have described, as consequent on the defects of our Chancery system, are obviously of so grave a nature as to justify and demand the establishment of separate tribunals, if necessary, for the purpose of affording redress. But we have seen that there already exists a jurisdiction, containing within itself all the machinery requisite for the attainment of that end.

The erection of new and independent tribunals would be in the nature of an experiment, which, however imperatively required by circumstances, would afford some pretence for the financial fears of a Minister—some shadow of excuse for the habitual scepticism of the opponent of all change, the *laudator temporis acti*. But in this case, it may be said, that the experiment has been tried, all its risks incurred and triumphantly overcome by the creation of Local Courts, and by their success with their present restricted jurisdiction. All that remains to be done, is to make use, for the redress of Chancery grievances, of a jurisdiction already in being for other purposes.

An addition of new branches of jurisdiction to the present County Courts would be analogous in its effects to the opening of new branches of traffic on a railway already constructed and long previously in operation,—it would be all “clear gain.” To use a commercial phrase, the “fixed expenses” of Local Courts will be nearly invariable whether applied solely to small Common Law actions, or applied to such actions conjointly with Equity suits, Bankruptcy, &c. The rents of courts and offices, the salaries of clerks and bailiffs (if paid by salary), and the salaries and travelling expenses of the Judges, would not (if new duties were added) be increased to an extent at all commensurate with the additional services rendered. On these grounds, we consider the increase in the number of Chancery Judges which has recently taken place (though an advantage compared to an absolute denial of justice) as a measure of questionable expediency. Were the entire business of the Chancery Courts divided among the sixty County Courts circuits, the additional duties imposed on the Judges of those Courts would, when thus divided, be felt to be a comparatively light burden; at the same time that justice would be brought to the home of every English subject.

For the public interest it is most important, in consequence of the principles we have just referred to, that the functions exercised by Local Courts should be as numerous and as diversified as possible; since the advantages derivable from these Courts (in proportion to the expenditure) will, for the reasons

above indicated, be great, in nearly a direct relation to the multiplicity of the subjects over which they shall have jurisdiction. This proposition is equally true, whether those Courts be supported by Fees or by the State, for in either case the great objects of economy and efficiency will be equally promoted.

We have in a former Article ¹, pointed out the great injustice of rendering these Courts self-supporting, while those in which higher sums can be recovered are maintained by the tax-payers of the country.

If this system of discrimination be unjust in itself, it assumes an aggravated form of injustice, when business such as that ordinarily decided in Chancery is withheld from the County Courts, and artificially concentrated in the Metropolis. Why should a "bounty," to use a phrase of the political economist, be given to the Superior Courts of Chancery and Common Law?

Notwithstanding the attacks to which they have been exposed, there can be no doubt, that as a body, the present Judges of the County Courts (with perhaps a single exception, which proves the rule,) are eminently qualified to discharge satisfactorily the functions we have proposed to confer upon them. Of their fitness for such duties, we have sufficient guarantees, not only in the well-known standing of the individuals selected, but also in the conscientious character of the great Judge by whom they were appointed—Lord Cottenham. We may here remark, that a very large portion of the Judges are Chancery Barristers, including some very eminent and experienced members of the Equity Bar; among others, we may name Mr. J. H. Koe, Mr. J. B. Parry, and Mr. J. Wilson.

¹ 4 L. R. 406.

ART. IV.—ELECTION BRIBERY AND CORRUPTION.

WE have so often discussed the Law of Evidence Amendment Act (Lord Brougham's), that we shall not now enter upon the general subject of this important change in our judicial procedure; but shall confine ourselves to one of its results, from which we expect the most beneficial effects. We refer to its bearing upon the abuses in the Electoral system; and to this interesting view of the matter we beg the best attention of our readers, both in and out of the legal profession.

The extent to which bribery, and generally, the corrupt influence exercised over voters, has of late years been carried is one of the most painful subjects of contemplation to all lovers of their country, — it may be added, to every virtuous mind. The offence of taking a bribe is grave enough in itself; it saps the very foundation of representative government, while it demoralises the guilty party, because it is a direct breach of an important public duty, and an implied false representation. But it involves another yet graver guilt; it involves the moral guilt of perjury, among the very worst crimes that man can commit, — the most dreadful in itself, the most frightful in its consequences to the community. Whoever takes a bribe well knows that the oath may be administered to him at the hustings; and he well knows that he will not refuse to take it. He has, therefore, made up his mind to forswear himself if need be; he stands, with respect to perjury, in the same predicament in which the highwayman or the burglar stands with respect to murder; they are ready to murder if their victim resists, or if he recognize them; if they are not murderers, it is because, by accident, there has been no inducement to take his life; but the moral guilt taints their minds. So does the moral guilt of perjury taint the mind of the bribed voter; he has not taken the oath, only because it happens not to have been tendered.

The extent to which this offence has been carried is truly

lamentable. Wherever the body of voters is inconsiderable, it is found more or less to prevail; and under the old system, before the Reform Bill, in the towns where freemen alone had the franchise enormous corruption existed. Thus it has been stated in Parliament more than once, and never denied, that at one Liverpool election (that of 1812) 50,000*l.* were spent, which, allowing 20,000*l.* for conveying the non-resident voters, would leave no less than 30,000*l.* given in bribes. At Lancaster a contest never cost less than 15,000*l.* to each side. It is believed that the Liverpool election of 1830 cost considerably more than that of 1812. Then the audacity with which the offence was in many places committed is truly disgusting. At the head of these stands Stafford, where the voters gloried in their shame,—marching to the poll with bank notes stuck in their hats as badges of honour; expressing a hope that the successful candidate would again seek their support; grievously disappointed when he plainly told them no fortune could afford it, and added, “I have bought you, but I will not sell you.”

The adversaries of the Reform Bill charged upon it the tendency to increase bribery. Lord Lyndhurst foretold this in 1832. Lord Brougham argued that it could only have the tendency if the Legislature took no effectual steps to check an offence which was certainly likely to keep some proportion with the increased number of popular elections. But so little were the authors of the Reform Bill blind to this tendency and the necessity of new checks, that a Bill with that view was brought in by the Solicitor-General (Mr. now Lord Campbell), on the part of the Government, and it had passed through nearly all its stages in the Commons when the Session closed. It must indeed be admitted, that if for a hundred seats by nomination, or say, by bargain with boroughmongers, you substitute as many seats by open election, a very great increase of corruption must be the consequence unless due means are devised to check it; and doubtless the corruption is immeasurably worse, both greater in amount and more heinous in kind, which is exercised among twenty or five and twenty thousand voters, than that which is practised by twenty or five and twenty persons paying

for their seats in breach of the Act made in 1809 ; and it is probable that not more than this number actually purchased seats. But it was also contended by the supporters of the Reform Bill, that if such was its tendency, to increase the offence, the new system also afforded a most important facility in detecting that offence, because the lawful expenses of elections were now reduced to a very moderate amount ; and thus any large expenditure which was in any way discovered, must of necessity have been for illegal purposes. Nevertheless, new means of detecting even that excess of expenditure were admitted to be absolutely necessary, and the more necessary the greater the amount of the corruption practised.

Thus it is not surprising that so many attempts have been made to put down this enormous crime ; and yet we cannot but be sensible how little has been effected towards its extinction. Among other means, one has always appeared to reflecting men highly expedient, with a view greatly to check, if not entirely to extirpate, the offence. It has been frequently proposed to require that each member on taking his seat, should solemnly declare, either upon oath or upon honour, that he had neither given anything nor promised anything, by himself or any other ; and that he neither knew of any gift or promise, nor believed that any had been made in his behalf or for procuring his election ; and that he never would pay anything which he afterwards discovered to have been promised for securing that election. In answer to the objections brought against this plan, it was affirmed that if any person were found at any future time to have sworn or declared falsely, beside the risk he ran of punishment, he never could more hold up his head in society ; and that even if legal proofs were not forthcoming to convict him, enough would be known to ruin his character : hence it was said, very few would ever dare to commit the offence.

But the objectors prevailed. Had the House of Lords sent down a Bill with this provision, it was concluded that the Commons would throw it out ; as, if not trenching upon their privileges, yet interfering with that which is no doubt

peculiarly their province—guarding the purity of elections. Although some of the most important provisions in the old Bribery Acts originated in the Upper House, yet it was deemed expedient to wait until the Commons plainly indicated an intention to do nothing or nothing effectual. Accordingly it appears that Sir John Packington's Bill in 1849, was brought into the House of Commons expressly with a view of avoiding anything like an encroachment by the Lords.¹ But the Commons seem to have had no great hankering after an effectual measure. They rejected this, the real object of the Bill; and sent it up to the Lords with such provisions as ensured its immediate and unanimous rejection; for it proposed that every voter should be disfranchised for life, against whom any Committee should report that he had received a bribe, although he had been no party to the proceedings, had never been examined himself, had never been represented by counsel or agent, nor had ever heard that any inquiry respecting him was going on. It is very fortunate that the Commons who rejected the declaration in the Bill of 1849, were not aware of the operation of the last year's Evidence Bill; for that Bill fortunately has escaped, and its operation, most happily, is to afford a remedy, in some respects, indeed in all respects save one, much more effectual than the Declaration.

It is now the Law that all parties may be examined as witnesses, either by being presented on their own behalf, or being called by their adversaries in any civil suit, (except actions for adultery and breach of promise of marriage,) and in all inquiries before any court, or any person having power in any way to examine witnesses. Taking the second and the fourth sections together, no doubt can exist that the provisions of the Act apply to inquiries before Election Committees; the second is indeed sufficient of itself; but the reference to Parliamentary proceedings in the fourth would be sufficient to remove all doubt, if doubt could arise upon the second. We are therefore to assume that the parties to an election petition, and to an action for the penalties under the

¹ Parliamentary Debates, 30th July; 1849, in which the Honourable Baronet was stated to have acted in concert with a member of the Upper House.

Bribery Acts, are competent witnesses, and are compellable to attend and give evidence. Now let us observe the inevitable consequences of this provision.

Every party may now be examined, the principal as well as the agent. All are subject to be closely questioned, to have their evidence sifted by the most rigorous cross-examination. Not a question that can trace, or help to trace, acts of bribery, but can be put. Whatever each person has done, or directed to be done, or given any authority for doing, may be inquired into—and of himself, who cannot plead ignorance: not only as to what he has done or authorised, but what he knows, what he believes, what he suspects to have been done on his behalf, or by his agents, or by his friends, he may be asked. What he has promised, by himself or others, what he has given any one reason to expect or to hope, of course comes within the description of things done. But he may be asked as to his own intentions, his expectations of what he shall be called upon to pay, or to do. In short, there is not a thought that can have passed through his mind connected with his election, which may not be wrung from him when under examination.

We have stated what certainly *may* be asked; but it is equally certain that all this *will* be asked, provided there is an inquiry in an Election Committee. We have said that all he knows may be wrung from him; but no doubt the greater part of the questions suggested are such as he may refuse to answer; not the whole, for some most important particulars, within his own knowledge exclusively, he will be compellable to disclose. But suppose he might, on whatever ground, refuse to answer the whole, that ground can only be because of his guilt: and who, in such a case, will venture to refuse? The decision of the Committee would at once unseat him, if the member, or reject him if the petitioner; and all this must be well known to him at the time of the election, and on the eve of it when preparations are making for the contest.

We have assumed, it is true, that a Committee is to sit, or at least is expected to sit; but this is a necessary part of the case. All bribery implies a contest; and a contest im-

plies a Committee, or the expectation of one. Wherever there is a contest—that is, wherever there is bribery—the parties act upon the presumption that there will be a petition; and even if they can hope to compromise with one another, they never can prevent partisans, under the influence of disappointment, disputing the seat. Nay, the less excusable feelings of mere revenge and spite, and the still worse desire of profiting by threats to extort compliance, such as bargains formed between electors, or even the most sordid of all motives, the desire of extorting money, will now more than ever expose parties to the almost certain danger of having whatever they do thoroughly sifted in a Committee, or of suffering severely to buy themselves off. Hence we may fairly assume that every man who presents himself to the electors where a contest exists or is expected, will henceforth act under the constant apprehension of whatever he does contrary to law being discovered, to the ruin of his character, about which he may care little, but also of his interests in the election and all that is connected with it. No doubt whatever can be entertained, that desperate, reckless, silly men alone will venture to bribe or treat, or do, or authorise, or be in any way parties to any illegal act—any thing the discovery of which, or the vehement suspicion of which, would either injure their reputation or ruin their parliamentary prospects.

We have referred to the proposed Declaration of members on taking their seats, and have stated that, in all respects save one, the Examination of Parties affords a far more effectual check, because a person might hope to escape when he had to undergo no examination, whereas the Examination renders escape impossible. Besides the Declaration would not affect a defeated candidate; and thus men's apprehensions of risk would be in the inverse proportion of their hopes of success; and we know how apt a person is to say, "If I win the day, I shall then consider whether I can make the declaration or not." The exception—the circumstance in which the Declaration has the advantage of the Examination—is not because the former applies to all members, whether the seat is disputed or not; for we have shown that bribery cannot be to any considerable extent committed, unless in

cases where a Committee is expected; and the question turns upon the apprehension of parties at the time of being tempted to break the law: but the Declaration extends over future acts of the member; and a person who had solemnly sworn, or promised upon his honour, never at any future time to give anything whatever, by himself or others, to the voters, would be irreparably ruined in his character, were it found out,—as it most certainly would be by the disclosure of the voters themselves,—that he had violated his solemn and deliberate engagement. In this respect, and in this respect alone, the Declaration is more effectual than the Examination, which can only touch the expectation or intention of the party; and the acting contrary to that intention would not be so fatal to his reputation as the breach of a solemn promise. In all other respects the Declaration is less effectual. For our parts, we can see no reason whatever for not enacting also the Declaration: and possibly, now that the Commons have lost the greater portion of the ground upon which they stood in 1849, they may be disposed to abandon that which remains so far as regards the proposed Declaration; but there is no comparison whatever between the operation of the Evidence Bill and all the *other* measures which have at any time been carried or propounded with the view of preventing bribery. To one of these we have already adverted,—the Bill brought in by the Government to accompany the Reform Bill of 1832. It denounced as the punishment of bribery perpetual disqualification to sit in Parliament for any place, and perpetual disfranchisement of the voter; the test in each case to be the report of a Select Committee, or a judgment in a court of law in an action for the penalties. Another important provision regarded general bribery or corruption, with a view to the punishment of the borough. This might be inquired of within two years after the time for petitioning against the return had expired. The Committee's report of general bribery was to be subject to review; and after full and formal decision, leave to oppose being given in all stages of inquiry in both Houses, their joint vote was to disfranchise. The Bill had been apparently brought in too late in the Ses-

sion ; for after it had gone as far as the Committee, and been reported with amendments, on the 1st August, 1832, we find no more mention of it in the Journals ; so that it was dropt, probably from the well-grounded apprehension that at so late a period of the Session it never could pass the Lords.

Another Bill for facilitating the inquiry into election corruption by indemnifying witnesses was presented to the Lords by Lord Brougham in 1842, and passed that House. It was retrospective as to Parliamentary bribery, and did not affect future elections, being only intended to discover and punish the wholesale corruption notoriously practised at the last election, that of 1841. Lord Campbell most truly objected to the Bill, that it did not provide for the examination of the parties themselves, if the Committee should think fit. The indemnity was to be given to the witnesses at the discretion of the Committee, in order to prevent a person from getting himself cited for the purpose of being indemnified. Also it was fit that the Committee should judge whether or not the truth had been disclosed by those seeking indemnity. This Bill was thrown out by the Commons, who had sent up a Bill on the subject the year before. This Bill was of necessity rejected by the Lords, and for two reasons : first, it came up so late that the first discussion upon it took place on the 17th of June, the dissolution being five days after, 22nd June ; secondly, it contained such provisions as no person of common sense could expect the Lords to sanction. It gave indemnity to every person who might be examined as a witness, no matter by whom called and what evidence he gave ; so that all who were guilty of bribery were effectually protected from all consequences of their offence by merely being called and asked a question the most irrelevant ; so that it might justly be called a Bill not to prevent but to encourage bribery. It also was highly objectionable by compelling persons to criminate themselves, and the husband the wife, and the wife the husband ; nay, by compelling attorneys and counsel, and their clerks, to disclose matters communicated to them professionally after the offence committed, and they not being in any way concerned in the commission of it.

In 1842 the second reading of another Bill was moved

so late as the 5th August, 1842, by Lord Campbell, who lamented that it did not go further—in which he was joined by Lord Brougham, both peers approving its provisions as far as they went. This Bill passed, and is the 5 & 6 Vict. c. 102. Its provisions principally affect compromise and abandonment of charges; and it arose out of the well-known proceedings of Mr. Roebuck the year before in connection with the then recent general election. The Bill enables Committees of inquiry as to general corruption to examine candidates and others, being members, in all cases of compromise and abandonment of charges; but no Committee under the Act can affect any seat.

We need enter no further into the history of the late attempts to grapple with the monster evil of which all men complain. Enough has been said to show very plainly how valuable the late change in the Law of Evidence has been in this as in all the other departments of judicial procedure. It appears to afford by far the fairest prospect that has yet been held out of purifying our electoral system, and removing one of the very worst taints wherewithal the morals of the community can be infected. For let no one vainly imagine that the evil consequences of corruption can be confined within the limits, comparatively narrow, of that portion of the politic body which it directly taints. It is not the nature of man to practise one vice of a grave description, and hold the rest of his life and conversation pure. Moral rottenness is as certainly self-propagating, self-extending, as physical; and while at each general election thousands of persons, in all the various districts of the country, are corrupted as electors, two consequences inevitably follow. Those who contract the actual guilt of bribery with the moral guilt of perjury are no longer of sound character in other respects, unconnected with elections; and also others, as well as they, become contaminated. The general frame of society is tainted; the public morals at large are corrupted. To this contamination, we most confidently entertain the hope that the new Law of Evidence has afforded a check—that it will tend to prevent the mischief from spreading.

But we ought to add that two classes of the community,

more perhaps than any others, are benefited by the improvement in our law, — the voters, whom it protects from the solicitation of their virtue; the candidates, whom it protects both from falling into the temptation of resorting to unlawful courses, and from the claims of profligate constituents. After the far more important topics on which we have just been dwelling, these are indeed comparatively less considerable; nevertheless we cannot close this Article without adverting to them.

We must further note a necessity which arises out of the new shape that election inquiries must now assume — the necessity of amending the construction of the tribunal which decides on election cases. The House of Commons seems resolved still to retain in its own wholly incompetent hands the exclusive jurisdiction on election petitions, as if it were an inalienable privilege, and on the ground that the other two branches of the Constitution cannot interfere with it, which they might be said to do if any statutory provision were made upon the matter: — A gross absurdity at all times; but since the year 1770, when the Grenville Act created a new judicature for disposing of election questions, not only an absurdity in point of argument, but a glaring error in point of fact. Indeed subsequent statutes have been made regulating election trials, and some within the last ten years; and after the high privilege ground had been taken by the advocates of privilege against all interference; statutes made in this behalf, as it were *post litem motam*. We may add, that this consideration, and especially the Grenville Act, was urged as a powerful argument against the exclusive doctrine by a very high authority on such questions, a former Speaker, one who had filled the chair of the Commons during thirty eventful years of our parliamentary history, — the late Lord Canterbury. That nothing can be more unsatisfactory than the present system is manifest; this is admitted by all, even by those who most strenuously resist the change, — or at least all such change as would really improve the judicature. The changes that have in late years been made in it, may have worked some very trifling amendment, but a glaring denial of justice is still confessedly most obvious, while an utter inability successfully

to conduct the inquiry is confessed by all. We shall say nothing of the conflicting decisions upon the selfsame points of law (if law it can be called, which such Courts affected to administer), — contrary decisions on the same day, under the same roof; nor shall we refer to the heavy expense which is occasioned and the utter incapacity which is daily witnessed. But let us for a moment consider the degree in which impartiality exists, — that is, freedom from party influences, the most glaring abuse of the old system, under which a seat was determined by the balance of parties in the House, and ministers were turned out on the result of a vote upon an election return. How is it now under the amended law of Parliament? The course is to choose twelve persons, who shall be chairmen of the committees, and six are taken from one party and six from the other. There are electors, as it were electors, and they too are selected three and three in like manner. The committee consists of six and a chairman. The six are taken in equal numbers from the two parties. Thus all depends on the chairman. If he happens to be of the party to which the sitting member belongs, his election may be supposed to be sure, — if he is of the petitioner's, the latter may be expected to prevail. So at least would any one affirm, who only saw the arrangement so curiously made by the law on the manifest assumption that men will act as judges upon party principles, and be guided by party feelings. But the fact confirms this anticipation. It was stated in the House by Lord Brougham, when bringing this evil system under the view of the Lords, (see *Debates*, 2d May, 1842), that in fifteen committees which had been struck to determine election petitions after the dissolution of 1841, the members had been chosen in equal numbers, three from each party; and that in nine cases out of ten which came to a trial the decision had been given by the majority of four to three, the chairman deciding; and each decision in that exact proportion of cases had been according to the party politics of the chairman, — the Whig prevailing if a Whig was in the chair, the Tory, if a Tory. Surely this uncontradicted statement is sufficient to demonstrate that so shameful a state of things never can be suffered to continue. The chances are not inconsiderable that even such evidence

showing bribery to have been committed as we have been describing might fail to influence a decision where the chairman belonged to the party charged, and either in words, or by his more eloquent silence, admitted his guilt. The scandalous state of the judicature affords wrongdoers their only chance of escape from the operation of the late Act. Their knowledge of that state offers their only inducement to risk committing the offence. While it continues, the perfect efficacy of the law must remain somewhat doubtful. The substitution of a just and competent tribunal would render the law certainly effectual, and bribery would cease out of the land.

ART. V.—FRENCH CRIMINAL PROCEDURE.

THE great respect in which we unfeignedly hold our neighbours on the other side of the Channel, and our entire freedom from all feelings of national jealousy,—nay, our often testified inclination to copy after them whenever we found that we could benefit by their lights,—must avouch the purity of our motives when it happens that we see grievous errors in the course of their judicial procedure, and point out these errors with the sincere desire to see them corrected. We formerly showed how defective is their administration of Criminal Justice. Some answer was ventured, some explanation attempted, but both the one and the other effort with no success, because the trifling errors pointed out in our reference to certain of their laws had absolutely no bearing upon the main body of the charges which had been preferred, and the proofs which had been given, not from scanning the provisions of the Code, but from recent trials in which there had been manifestly committed the greatest sins against the most undeniable principles of justice — committed without the least attempt, on the part of the able and zealous and even unscrupulous advocates of the accused, to show that any the least deviation from the provisions of the Law had taken

place. We have now to call the attention of our readers, but especially of those in France who honour us with their patronage, to a few passages in the late trial at Lyons.

We begin by admitting that the proceeding was before a Military, not a Civil Tribunal. The almost entire suspension of civil liberty in France which has existed since the fatal Revolution of 1848, enables the Executive Power, with the approbation of a single vote in the National Assembly, to declare any district in a state of siege; and that in which the great city of Lyons is situated, the second in the country, has been for many months in that predicament.¹ We are very far from saying that this has been an unnecessary precaution against rebellion; but we note the fact, and we may also observe, that if in England any such power existed, and had been exercised in respect of one district, no state trial would have been allowed before a court-martial, or, indeed, in that district, unless there had been a legal impossibility to hold the trial elsewhere. However, it is most material to observe that in France court-martials, like that of Lyons, profess to be guided by the ordinary rules of evidence, and they are always under the presidency of several persons supposed to be well qualified to administer the Law, and who take legal advice in any case of difficulty. If, however, a great departure from the rules of Law has been committed in the case upon which we are about to comment, it is the bounden duty of the Government to annul the proceedings, and send the convicts to a new trial. If this be not done, we are not only authorised, but compelled, to assume that the proceeding has been conducted according to Law; and in favour of this assumption, we have the additional fact that it is impossible to read any details of a trial before the ordinary tribunals of the country,—such, for instance, as that at Versailles two years ago,—without being satisfied that the same kind of evidence is habitually received which we are about to prove

¹ Seven departments have been long in this state; and lately an eighth, the Ardesche, was added, with the approbation of the Committee of the Assembly acting during the recess. The departments of the Cher and Nièvre have since been added. — *Times*, Oct. 23.

utterly repugnant not only to every principle of justice, but to the dictates of common sense.

We confine our observations to one head; but it is the most important of all—the admission of hearsay as evidence—the admission, free, absolute, unchecked, uncontrolled:—“I heard from many persons that the prisoner had been connected with the conspiracy”—“Respectable persons told me that he had done so and so.” The prisoner asked who these persons were, but the answer given was allowed by the Court to be sufficient:—“I cannot tell their names, for I received the information as an Officer of Police.” Who can doubt that if this was a sufficient reason (and we do not, for the present, deny that it may have been), the evidence ought to have been struck out? But that is not sufficient; the statement had been made, and it had produced its effect. Made before a jury, it might have been fatal in spite of all the judge’s efforts to guard them against its effect. Made before judges, no one can pretend that it would have been altogether harmless. But our objection lies deeper. Suppose it were shown that the Court acted illegally in protecting the witness against the call to name his informers, suppose he had answered it by naming them, the error committed, and committed by the Law, is indeed somewhat less monstrous, but it is still sufficiently flagrant—the statement, the story of a person not seen, not heard, not subjected to examination, has been heard, and allowed to produce its effect against the accused; when, for anything that appears, if that person had himself been called, his prevarications, his demeanour, his self-contradictions, his known infamy, would only have covered the accuser with disgrace, possibly ensured the acquittal of the party charged.

There were even worse things done at this trial, but not done without some resistance on the part of the prisoners. Witnesses were suffered to state that they had heard reports in the neighbourhood of the principal prisoner, the alleged ringleader of the conspiracy, having led an impure life, and been guilty of incest, among other offences. It does not appear that the giving in evidence a report on mere rumour, was objected to; it should seem that had this rumour related

to the conspiracy, no one would have questioned its admissibility in evidence; but it related to matters wholly unconnected with the charge, and on this ground alone, as it appears, the prisoner so slandered, falsely as he alleged, took his objection. No doubt this aggravated the offence committed against every principle of justice, every dictate of common sense. But had the subject matter of the rumour gone directly to the subject matter of the charge, still any thing more disgraceful to a code of criminal procedure can hardly be imagined, than that it should permit a witness to tell the Court all the rumours which he had heard regarding the conduct of the parties on their trial.

We hope our English readers will excuse us for dwelling on points so familiar to every one in this country, when we add that our remarks are at present addressed to the French people, and above all, to their lawyers: yet it is fit that we add how little even the jurisconsults of our own country have a right to look down upon their neighbours when they reflect how strangely the first of legal philosophers erred, and upon this very subject of hearsay evidence. But the fundamental principle, the rule which requires its absolute and unqualified rejection, is so thoroughly well established in reason and common sense that nothing can shake it, and no one has ever persuaded himself to entertain a doubt respecting it, unless by confounding together two wholly different matters — inquiries of police, and inquiries of trial. When the only question is, who shall be put upon his defence, — that is, who shall be convicted as suspected, — no injury can arise from hearing whatever can lead to the detection of the suspected persons, at least no injury that is not abundantly compensated by the clue thus afforded; no risk is run that must not of necessity be incurred of giving trouble to the innocent, unless we would lose all means of tracing the guilty. But it is wholly different where the object is not to discover who has committed the offence, but whether or not the party suspected, and therefore accused, is the real offender. In this case what can be more important than the necessity of excluding all hearsay; in other words, of only allowing them to be examined who know the facts to which they speak?

If a witness were allowed to tell what another not produced had told him, we should be hearing the wrong man. We could only, by cross examination, sift his credit and judge of whether or not he had heard the story from another. He may be the most respectable of men in his life and conversation; he may give the most clear and consistent account; he may be entitled in every particular to our entire belief; we may believe all he says as implicitly as if we had ourselves been witness to the fact he relates, and after all what is that fact? Merely that some one had told him the story. But if that narrator were produced, he might be the worst of men, the most false, the most biassed by personal prejudices; the most inconsistent in his account, the most manifestly perjured upon his own showing,—a person whose whole demeanour on every question put to him proved him utterly unworthy of credit. Then observe the inevitable consequence of receiving his story at second hand. The party hearing most of the story knows that he could only damage the case by producing the original relater of it; and therefore keeps him back, while he hopes that its edition at second hand will produce an impression against which the accused cannot struggle.

We cannot help entertaining the hope that the gross absurdity of receiving all kinds of hearsay as if it were evidence, may, upon full consideration, be found rather to be an abuse which has crept into the French procedure, than a part of the Law itself. We well remember the famous trial of the Fualdes murder in 1817, already referred to more than once in the pages of this Journal. By the French law, no child under a certain age could be examined as a witness; two children said they had seen the murder committed; they were under the legal age and could not be heard to depose; but they told their story to a person of competent age, and he was examined—To what? not to the fact of the murder, but to the fact that the children had told him of it; this was supposed to get rid of the legal objection; and the Court considered that it had evidence of the murder. It was said at the time that the absurdity of this proceeding appeared too glaring, and that in a State trial, which took place immediately after,

some eminent English lawyers, among others the late Lord Ellenborough being present, they recommended the counsel for the prisoner to take an objection to the admission of such evidence. Possibly the question was not raised, but the belief prevails that no such evidence has ever since been admitted. We need scarcely add, that there is no one objection applicable to the admission of the child's evidence at second hand, which does not also apply to the admission of any other hearsay. Nay, we can figure to ourselves some colour of a reason for letting the child's story be heard which may not exist in the ordinary case. The child cannot be called; the adult may. There can be no ground for saying that the witness who heard the child's account is put forward while the child is kept back; a strong reason against hearing the adult's testimony at second hand. But it is needless to argue on the comparison of absurdities, either of which is so gross that no one could believe in their ever having been allowed to deform the procedure of a civilised State.

We trust we may be allowed in closing these remarks to express the unfeigned sorrow with which we regard the present unquiet and alarmed state of the great nation to whose jurisprudence we have been adverting. Is it doomed to pass through further and more severe trials than it has yet undergone? The bad spirit prevailing in many parts of the country, and the sad example of its government overthrown in a few hours while all seemed tranquil and prosperity everywhere reigned, forbid any very confident expectation that all will be well. But we have only to do with Jurisprudence; and we cannot help reminding the English reader, whose attention has been of late so powerfully fixed upon the judicial misconduct in Naples, and the French reader, of the Republican party whose gratification has been so loudly expressed at the judicial excesses of a Legitimate, Royalist government, how little the Republicans have to boast of in comparison of even the most despotic forms of European Monarchy. Let them cast their eyes back, not upon the Reign of Terror, but upon the mitigated—the greatly mitigated rule of the Directory; and ask themselves if any thing that has been done at Naples can be compared with the famous 18 Fructidor (4 Sept. 1797),

when, without the pretext of any plot, except the design of peaceably and legally preparing the way for a restoration of limited and constitutional Monarchy, 220 persons, including many members of both branches of the Legislature, four generals, one member of the Directory itself, some scores of priests, many aged men, many men labouring under grievous bodily infirmity, were seized, sent through the country for eight or ten days in iron cages like wild beasts, that they might be exposed to the scoffings of the infuriated mob, and then carried over to linger or to perish miserably in a pestilential climate, after a voyage more intolerable than that of the negro slaves, with the denial of every comfort to which civilised men are accustomed.

To this insupportable treatment was the conqueror of Holland, Pichegru, subjected for two months of the "Middle Passage" (as it might well be termed); the venerable Murinais, the amiable and accomplished Barthelemy, Barbè Marbois, Tronçon de Condray, Gibert des-Molieres: men second to none in Europe for unsullied integrity, and all the qualities both of the head and the heart that must endear and exalt our species. Each of the tyrants was allowed to name a certain number of victims; and they all inserted their personal enemies. This we know from M. Rœderes, who had been inserted, but Talleyrand begged him off, and inserted Perlet in his stead. It is painful to reflect on the part which both Moreau and Talleyrand had in this atrocious proceeding, ignorant, doubtless, of the frightful and disgusting details which the histories of De la Rue, Aymè, and Ramel, as well as others, have given of their intolerable sufferings; but the one planning the whole measure, the other participating in its execution, with the profligate Republican tyrants, the Barras's, the Rewbells, the Lepauxs, who were plundering and degrading their unhappy country. Assuredly the delight of the present race of Republicans at the exposure of enormities under a Regal government, should be tempered with the reflection how much worse scenes were enacted under their favourite system; unless indeed it be worse to outrage the forms of justice in the trial of assassins, than to punish with tortures

that made death a consummation devoutly wished for, without even the pretence of a trial, men not even accused of any grave offence, and men whose only crime was designing to turn their persecutors out of the public trust of which they abused all the powers.¹

ART. VI.—TRIBUNALS OF COMMERCE.— NATURAL PROCEDURE.

MR. LYNE has addressed a letter to Lord Brougham in the papers of the 5th September last, from which we extract the following passages relative to the important subject of Tribunals of Commerce, now, we sincerely rejoice to find, occupying the attention of the mercantile body in the City of London:—

“MY LORD,—A thousand most influential firms (representing many thousands of individuals), in the first instance, united to call the attention of the Lord Mayor of London to the change the trading community now seek for; and all the great trades of this empire are at this minute combining to create a fund to pay the expense of agitating the country on the subject in question; and, in the midst of all this preliminary movement, it was not a little pleasing to the merchants of London to notice that Lord Grenville,

¹ The History of the 18 Fructidor is well deserving of the closest attention from those who are speculating upon the advantages of Republican Government. There are other works beside those we have named, as General Durtre's *Memoirs*, vindicating himself; *Anecdotes Secrets du 18 Fructidor*; *Recueil des Victimes de la loi du 19 Fructidor*, &c. The picture presented by these works is frightful in the extreme; and some of the most important of them, as Aymè's, were published at the time and while the oppressors were in a condition to make answer and defend themselves. Yet, bad as these deeds of the Republicans were, what are they in comparison to the reign of blood and pillage with which their successors in the present day threaten us,—the men in whose eyes the Directory were mild and feeble and irresolute rulers,—the men whose political divinities are the Robespierres and the Billauds,—the men who openly avow from their secure retreat in London, that their object is to involve all Europe in anarchy and confiscation?

during his stay in Paris on a late occasion, availed himself of the opportunity to make minute inquiries as to the working of Tribunals of Commerce in that city. Amongst the British merchants in London there are many who have gained their experience, as to the admirable working of these tribunals, by acting abroad as Judges in these Courts; and these gentlemen know how, from their own experience, to value the force of the language used by your Lordship, and which I have just quoted, and with which they perfectly agree. The uniform tendency of legislation in this country formerly was, to put the administration of the law as little as possible in the hands of the lawyers, and as much as possible in the hands of practical men, bringing practical knowledge and common sense to bear in every locality, and in every pursuit. The loss of this system is very injurious to us as foreign traders (to say nothing of the miseries of home). We, therefore, desire that our rulers should say to us, 'We will restore thy Judges as at the first, and thy counsellors as at the beginning; afterward, thou shalt be called the city of righteousness — the faithful city — by your foreign connections.' By an under current our progress may be delayed, and still for a season may the system continue which deprives many an honest tradesman even of the effort to obtain his fairest demands, because now but too often he is harassed, baffled, and triumphed over by the unfair-dealing opponent, for whom a clever attorney can find innumerable loopholes; but, my Lord, the traders of this country, once up respectfully to demand an alteration, no bolt will be strong enough to close against them the passage to that change which, as practical men, they know to be fair and useful, especially for the weaker portion of the industrious classes; and I believe, my Lord, history can furnish no evidence that will prove that the united voice of the merchant was once treated with contempt by a wise statesman."

Lord Brougham, in his answer, from which the same papers give an extract, says that Tribunals of Commerce must be regarded as a branch of the great subject of Arbitration and Reconciliation, in connection with which his statement was made in the House of Lords respecting those tribunals in France and Belgium; and he adds: —

"In your letter you very much over-rate the value of my poor endeavours to amend the Law (unless, indeed, as regards Local Courts and Evidence). But one thing is certain; the various measures which I have at different times brought forward (and of

which a very few only have been carried) are not separate or insulated; they almost all proceed upon one view—the same in which your present city proceedings originate—I mean the design of making our Law, and above all, our Procedure, intelligible and natural, instead of obscure and technical—thus removing the complaints of speculative men, as Mr. Bentham, and practical men, as Lord Denman. Such was my aim in the measures respecting Libel Law, Local Courts, Facilities of Conveyancing, Law Digest, Public Prosecutor, Declaratory Action, Arbitration, Reconcilement, Law of Evidence, and many others. It is, therefore, a matter of course that I should regard with great interest your present proceedings, directed to the very same end. While agreeing in the principle, however, I am fully aware of the difficulty you will find in managing the details, and I strongly recommend the obtaining full information from France and Belgium.”

This correspondence gives rise to several reflections which we think it may be right that we submit to our readers.

In the *first* place,—though no one can for a moment doubt that some such tribunals as may facilitate the trial of mercantile causes are exceedingly wanted, and that incalculable benefits are derived from their establishment in other countries, yet,—to give any new judicature a compulsory and, consequently, an exclusive jurisdiction in all causes of this description, would, both in England and Scotland, be attended with great difficulty—would, indeed, be exposed to serious objections. It was probably with a view to this consideration—referred to, as it should seem, in his answer to Mr. Lyne—that Lord Brougham proposed, at least at first, to give such tribunals a voluntary jurisdiction only; and, accordingly, he treats the subject as coming under the great head of Arbitration and Reconcilement. But the French and Belgian tribunals have a compulsory jurisdiction.

Secondly. We have so often touched upon the subject of Reconcilement Courts, that we shall not at present renew the discussion. But arbitration is so intimately connected with the proceedings of the City gentlemen, which have for their object the obtaining an easy and expeditious, as well as cheap mode of settling their mercantile disputes, that we must shortly advert to it. Few who have of late years taken an interest in the Amendment of the Law can have forgotten

Mr. John Smith's statement, which was also made on another occasion by Mr. A. Baring (afterwards Lord Ashburton), that after a cause to which mercantile men were parties had lasted for some years in the Court of Chancery, and cost many thousand pounds, without making any sensible progress, it was referred to those two eminent individuals, who settled it in a couple of days, to the entire satisfaction of all concerned — except, perhaps, the professional men engaged. It is no wonder that suitors, or those who expect to be suitors, should reflect with envy on this remarkable example of the *natural*, as contradistinguished from the *technical* procedure. Now suppose there were established Courts in which any two parties having a dispute could have the matter of that dispute examined by an able arbitration, with power to take the opinion of a Court of Law or of Equity upon any point arising,—it is manifest that an immense saving of both time, vexation, and expense would be effected; and mercantile causes might in this way be referred to mercantile arbitrators without the least risk of misdecision from ignorance of the Law. It is often said, in answer to such proposals, that parties may at present refer their disputes to arbitrators in nearly the manner now pointed out; but all the difference in the world exists between this facility and that which would be given by the appointment of Official Arbitrators, clothed with the authority of public functionaries. In practice it would be found that whereas at present a very small proportion of causes is kept out of Court by reference; under the new system a very few causes would find their way into Court.

Thirdly, the improvement of Arbitration, the introduction of Reconcilement, the institution of Tribunals of Commerce, are all intimately connected with the preference of *natural* to *technical* procedure. It is also stated by Lord Brougham, in his answer to Mr. Lyne, that all the measures which he has at any time brought forward formed parts of a system whereof that preference was the foundation. We may confidently add that the great improvements now in contemplation, whether in legal or in equitable procedure, must result in bringing the parties as speedily as possible to confront each

other, and state their several cases intelligibly and plainly, that is, *naturally*, not *technically*. Then let us never forget to whom we are indebted for taking this great distinction three quarters of a century ago, and whose language we are now using in urging his fundamental doctrines, long held in abhorrence by some, ridiculed by others, regarded as visionary by all. When we name Mr. Bentham to such of *our* readers as are Law Reformers, we give a name familiar to *them*; but beyond this circle we fear the name is about as little known as in Justinian's time were the names of the great civilians whose learning he was causing to be digested, and whom, when one was mentioned, it is recorded that the listener thought some foreign fish was alluded to. Certain it is that there seems a general disposition among those who address the public through the press, and even among those who report the debates in Parliament and at meetings, to sink all mention of that illustrious name, as if when it fell upon the hearing it connected itself with no distinct idea. As friends to the improvement of Jurisprudence, the most important subject that can engage the attention of mankind, we are bound to express our sense of this injustice. True, the philosopher seeks after truth for its own sake; and the philanthropist pursues his benevolent objects for the gratification which he finds in benefiting his fellow men. But it is both just and expedient — both the duty and the interest of the community — to hold in perpetual remembrance their greatest benefactors, whose exertions may be stimulated by the examples of public gratitude, while a prospect of the pleasure that it is fitted to bestow upon generous minds can never make their motives appear less pure.

ART. VII.—THE REFORM OF THE SUPERIOR
COURTS OF COMMON LAW.

[In a letter from a County Court Judge to the Editor of the "Law Review":]—

"DEAR SIR,

"As you have devoted much of your work to the discussions of the Reform of the Superior Courts, I beg leave to address to you a few remarks on that subject.

"Can the Superior Courts of Common Law and Chancery be modified so as to meet the public wants? Can they be so far changed and improved as to comply with the pressing demands of public opinion? Can these objects (if attainable in themselves) be accomplished consistently with the hopes and prospects of the Bar?

"These are important questions in themselves; but their intrinsic importance has been greatly increased by the circumstances of the present time. Old systems have been disjoined. Old landmarks have been effaced or confused. The general demand for Law Reform and the establishment of County Courts have altered the position of all other tribunals—to such an extent as to necessitate the remodelling of our entire forensic system. Nor does the subject admit of delay. The only question that remains for solution is with respect to the course that should be pursued for the fulfilment of the end prescribed.

"It seems to have occurred to many eminent living Law Reformers, that the Superior Courts may be made to approach in cheapness and accessibility to the County Courts by means of two changes; namely, first, by the abolition of special pleadings; and, secondly, by holding the Assizes at shorter intervals. Lord Denman, among others, appears to have adopted these conclusions. The question involved is a practical one, and requires a practical solution.

"1st. Special pleadings are not commonly a principal

source of the costs of an action. The bulk of those costs generally consists of the fees of attorneys and counsel, and of the travelling and other expenses of witnesses. These two heads of expenses do not in their nature admit of reduction. The charges of attorneys in Common Law actions have already been cut down to the most moderate standard. The fees of counsel, especially on circuit, have never, as a general rule, been adequate to afford a remuneration at all equivalent to the time and labour bestowed. The expenses of witnesses are in their nature incapable of reduction when they are taken away from their own homes and occupations.

“2ndly. With reference to holding the Assizes more frequently.

“This cannot have the effect of rendering the administration of the Law in the Superior Courts as cheap as it is in the County Courts, unless the Assizes be held in several places in each county; for it is not so much the frequency of their sittings, as the numerous places in which they are held, that make the County Courts so beneficial to the country. It is the latter feature which renders them the means of accomplishing their chief professed object, of ‘bringing justice home to every man’s door.’ Creditors, in most instances, are content to wait a considerable time for their debts, provided they can eventually recover them at a moderate cost. For this reason, if the sittings of the Superior Courts were even more frequent than those of the County Courts, the latter tribunals would still be preferred, if held nearer to the residence of the suitors. They would be preferred on account of the saving of travelling expenses, and of the immunity they afford from the charges of attorneys and the fees of counsel.

“For example, were the Assize Courts held quarterly instead of half-yearly, the change would have no appreciable effect in reviving the business of those Courts.

“Probably you will suggest, in reply to these remarks:— ‘If frequent sittings will not suffice, let the Superior Courts follow the example of the County Courts in their other characteristic feature. Let their sittings take place in various localities in each county.’

“In answer to such a suggestion, I would venture to ask,

— What would the system thus introduced in reality be but a system of County Courts under the guise of Superior Courts?

“Frequent sittings and numerous Court Towns — these are the essential and distinctive features of the new jurisdiction; and any other tribunals which assume the same features, will differ in name only, and not in reality, from the County Courts.

“If the Judges of Westminster Hall should be required to travel more frequently and over larger circuits, their heavy travelling expenses will be increased in proportion, and their number and salaries must also be increased at the expense of the country. Need I ask whether an augmentation of the cost of our old judicial establishments will be endured at the very time when those establishments have been practically superseded? Will the Superior Courts be supplied out of the taxes of the country with the means of artificially entering into a vain and unseemly competition with a new jurisdiction, which has rendered them all but useless?

“When it is proposed to make the Superior Courts as cheap as the County Courts, in judging of that proposition the use of ambiguous words must be avoided. What is meant by cheapness? The expression may be applied in three very different senses — it may refer simply to what is paid by the suitors, or it may apply also to what is paid by the tax-payers of this kingdom, or it may include both.

“How is it possible, in the third sense of the word (which is the only correct one), to render the Superior Courts as economical as the County Courts, the salaries and expenses of the Judges being at least fourfold on an average? The County Courts are incomparably cheaper to the suitors, being entirely self-supporting, than the Superior Courts, though the latter are maintained out of the coffers of the State.

“Let this palpable injustice — this flagrant anomaly — be removed. Let both jurisdictions be placed on an equal footing in this respect, and then all comparison or approximation on the particular ground of economy will become even more hopeless than it is at present.

“Is there any abuse within the whole range of our legal

institutions that can form an object more worthy of your exertions — as the firm advocate of the Reform of our Law, and of the fair and impartial administration of the government and of the public revenues of this country ?

“ In the county in which I now write, the complaints in the County Courts have amounted to several thousands during the past year. The causes tried during the same period at the Assizes have been four only.

“ Is it to be endured that the grants of the public treasury should be confined to tribunals which have been deserted by the people, and withheld from those which have become the Courts of the Country ?

“ To multiply the sittings of the Assize Courts would be injurious to the Bar — by compelling that body to incur the expenses of additional circuits without creating any probability of a commensurate increase of business.

“ Whence can we expect to derive that new stream of business which it is conjectured will flow into the Superior Courts — if reformed ? This is a question that requires to be firmly probed and closely examined.

“ Can we look for a large number of additional causes in cases which are excluded from the present jurisdiction of the County Courts ; viz., in those instances in which the amount claimed exceeds 50*l.*, or where slander, title to land, &c. are involved ? I venture to think we cannot reasonably entertain any such expectation. The number of causes which are submitted to Courts of Justice cannot be determined by the same rules that govern the results of commerce and political economy : suits are not multiplied in proportion as the remedies are made cheap, on the same principle that the demand for corn and coffee, or timber, is increased in relation to the reduction of price. Actions are founded on claims or injuries, which are not rendered more numerous by new facilities of redress. The only effect of those facilities is to induce creditors and others to seek compensation for wrongs, which, in many instances, would otherwise have been silently endured.

“ It may be assumed, therefore, as a rule, that actions will be, comparatively speaking, very few in number as regards sums above the jurisdiction of the County Courts with

respect to amount, and also as regards the other exceptions from that jurisdiction.

Consequently, under the most economical and perfect system of administering the Law (that could be introduced into the Superior Courts), the business derivable from such actions would be too trifling and insignificant to give to the present Judges of those Courts employment adequate to justify the continuance at the expense of the people at large of the present Assize Circuits.

On the other hand, what reasonable ground can exist for excluding from the County Courts the few suitors who may have claims to sums above 50*l.*, or claims connected with land, &c. ?

Any attempt to bring back to the Superior Courts a part of the present business of the County Courts would be found hopeless in practice, even could the former be made to approximate in economy to the latter class of tribunals. The preference commonly entertained by the legal profession for the decisions of the Judges of the Courts of Westminster Hall does not, generally speaking, influence the minds of those commercial men and others who are most frequently suitors in the County Courts. On the contrary, those classes (being prepossessed against a system they think too technical and refined to be consistent with the ends of justice) would be guided in their choice of Courts by the impression that in a just case they would have a more certain prospect of redress before tribunals of a more popular constitution. Moreover, at the Assizes juries are the judges of facts; and the experience of the County Courts clearly shows that the decisions of juries in civil cases are not commonly desired by the suitors.

“ In the great majority of suits in the County Courts the suitors act for themselves. Where attorneys are employed they rarely possess the power of overruling the opinions of clients in favour of Local Courts. Nor, as regards the country practitioners, do I believe that they generally wish to make the attempt; for the heavy agents' charges they have to pay have commonly rendered the Superior Courts of Common Law with them also unpopular.

“ I shall now advert to the question, How far are the prospects of the legal profession dependent on the maintenance of the Superior Courts?

“ I do not believe that the country attorneys have any interest in the maintenance of those Courts. In fact, I think it plain that they have an interest of an opposite nature.

“ The classes whose prospects are more apparently bound up with their preservation are the London attorneys and the Bar; and it is these classes that contribute to render assize trials so expensive.

“ To Special Pleading is vaguely ascribed the costs occasioned by the expense so unnecessarily imposed on the suitor, of acting at every stage of a cause through a London attorney (the agent of his own attorney in the country), or rather through both. What can be more absurd than that the mere mechanical steps of the cause — such as the issuing of a writ, and the filing of the form of appearance — should take place in London? Even if a portion of the actions which arise in this country shall continue to be left to a distinct class of judges, it will be the height of absurdity not to allow the formal processes of a cause (no matter whether tried at the Assizes or in the County Courts) to be transacted through the medium of the County Courts' office of the district in which the parties reside. The general condemnation of special pleading implies that henceforward, in all Courts, the preliminary proceedings in causes shall be confined to mere formal and mechanical steps. If so, the employment of London agents ought to be dispensed with.

“ As regards the Bar, as I have already intimated, the remuneration its members receive is undoubtedly inadequate. Nevertheless it is equally true that in the Superior Courts the suitors are generally aggrieved by the rule which compels them to employ barristers in cases in which the services of that body are by no means required. This has become very conspicuous since the extension of the jurisdiction of the County Courts to 50*l*. How many cases involving that amount daily come before us in which the claim is so simple that defence is impossible, and advocacy superfluous, and in

which the parties act for themselves. Yet previously to the measure alluded to in all such cases, however simple, the suitor was obliged to employ a country attorney, and his town agent, and to engage the services of counsel.

"To maintain the Courts of Common Law and Chancery is, I venture to think, entirely impracticable, for the reasons above given. No choice remains but that of fairly and candidly adopting the system of County Courts, and suiting it to the general necessities of the country, by giving to it unlimited jurisdiction, subject to a well regulated power of appeal.

"The country cannot advantageously support two concurrent systems for the administration of the Law. The result must obviously be a useless waste of public means, which, if concentrated on one comprehensive jurisdiction, would be productive of the happiest effects.

"Were the various branches of the legal business of the English counties — such as Common Law, Equity, Bankruptcy, &c. — united in one jurisdiction, the expenses contributed by the public treasury on the one hand, and by the individual suitors on the other, might, in each instance, be largely reduced, and the Courts, at the same time, might be more liberally supported.

"Finally, the question still remains to be investigated. Assuming that the Civil business of the country could (consistently with the practical considerations on which I have touched) be preserved, or rather restored, to the Superior Courts, in what would the advantage consist? The system is obviously inferior to that of the County Courts; and the Judges of the latter jurisdiction were selected almost exclusively either from experienced Judges of previously existing Local Courts (commonly men of general eminence), or from barristers of those classes from which the Judges of the Superior Courts are usually chosen, viz., Queen's Counsel, Serjeants, Special Pleaders of long standing, &c. Does any well-informed person suppose that the superiority of rank (with reference to a comparison of the Judges of the two jurisdictions) can afford under such circumstances any guarantee for personal superiority? Need I remind you that

among the Judges of the County Courts are to be found many individuals quite as distinguished, by legal and general knowledge, sound judgment, and large experience, as are the majority of those of the Superior Courts?

“ The undoubted success of the County Courts, as a system, is, in truth, palpably irreconcilable with the attempts that have lately been made to throw discredit on the Judges personally; for the efficiency of every tribunal is essentially dependent on the personal qualifications of those by whom its judgments are pronounced. It cannot be denied that the decisions of the County Courts are commonly preferred, quite as much as their cheap modes of procedure. It is felt by the country that in those tribunals the fundamental principles of the Law are faithfully maintained, at the same time that substantial justice is done.

“ On the other hand, the most experienced practitioners know best that it is no exaggeration to say that, in the Common Law Courts at Westminster (especially in some of them), justice and law combined have little more than an even chance in the tortuous game of special pleading. It may be said, ‘ This is the fault, not of the Judges, but of the Law; ’—a proposition, however, that cannot be admitted to be entirely correct. The subtle network of special pleading has been the production of the Judges themselves. It belongs to what Bentham calls ‘ Judge-made Law.’ Moreover, it is unquestionable that it has been drawn tighter within the last ten years.

“ All laws admit of a liberal or of a narrow construction; in other words, of a sound or an unsound interpretation; for the two former terms are obviously synonymous with the two latter. With what reason can superior judgment be ascribed with certainty to tribunals in which sophistical views of the Law are so often preferred to their spirit?

“ Both the Bar and the solicitors as a body would largely gain by the change above indicated. It is the ‘ transition state,’ the ‘ halting between two opinions,’ that is the most injurious to both. It is entirely a mistake to suppose that the County Courts do not afford a wide and liberal scope for the Bar; for though suitors in those Courts have been justly

relieved from the compulsory employment of that body, yet, owing to the immense number of cases that occur, and the difficulties that frequently present themselves, there is ample room for the functions of counsel, even at present. But this would be more especially the case if jurisdiction were given over larger and more important cases.

“In the County Courts of the metropolis, and of those districts which are readily accessible by railway from London, there is an immense field for advocacy, which may be entered upon without the disheartening risks, anxieties, and expenses of a circuit.

“Though free admission should be preserved to attorneys, as advocates, I do not think it can affect the prospects of such members of the Bar as may choose to devote their attention to the County Courts system and practice. Such men will voluntarily be employed as advocates by attorneys, especially in large cases, where expense is of less moment than security; — a remark that applies to a large portion of the cases above 20*l.* and to nearly every case above 50*l.* There would necessarily be more cases of the latter class in a cheap jurisdiction than occur in the Courts of Westminster.

“Were men equally able and eminent with those who enjoy the principal business behind the bar of Westminster Hall to accept briefs in the County Courts, I believe they would be generally employed, and quite adequately remunerated. But it is not for the public interest that barristers should indiscriminately have a forced priority over attorneys who may be fully qualified by ability, intelligence, and gentlemanlike feelings, to do justice to the causes of their clients; — a remark which I have found generally applicable to such members of the latter branch of the profession as are in the habit of acting as advocates in my circuit. I may state that in the Courts of that circuit attorneys very commonly obtain a liberal remuneration as advocates, and very frequently act as such for other attorneys.

“In remote country districts it may not repay barristers to cultivate this kind of practice; but in the metropolitan and in town districts it will fall into their hands (provided only that they devote adequate attention to the law and sys-

tem of County Courts) by the choice of the attorneys themselves, and as a natural result of a convenient division of labour.

"The abolition of special pleading, of the costs of London agents, and of the chief expenses of witnesses, will enable the parties to give a more liberal remuneration both to the advocate employed and to their own professional solicitor in County Courts cases.

"I remain, dear Sir,

"Your obedient servant,

A JUDGE OF COUNTY COURTS.

"September 26."

ART. VIII.—ON THE UNION OF LAW AND EQUITY.¹

MY LORD PRESIDENT AND GENTLEMEN,

I AM so unknown and new a member of this Society, that it is with diffidence I address so learned a body on a subject beyond comparison the most important of any which has ever engaged their attention. But I encourage myself with the recollection of that indulgence which I have often seen extended in this room to the humblest inquirers after Truth, and with the assurance that in this enlightened audience I run no risk of offending, by what I have to say, *existing prejudices*. You, at least, I am persuaded, *have none*; except, indeed, it be the praiseworthy prejudice for TRUTH. You, I am persuaded, as often as you assemble here, divest your minds of professional and party bias, and clear them, in singleness and candour, to the apprehension of righteous judgments.

¹ A Lecture, delivered in the Law Amendment Society's Rooms, 21 Regent Street, on the 14th of April, 1851, by CHARLES FRANCIS TROWER, Esq., of the Inner Temple, Barrister-at-Law, late Fellow of Exeter College, and Vinerian Law Scholar, Oxford.

Within the limits beyond which it would be improper to trespass upon your indulgence, it will be impossible to do more than present to you an outline, and that a very imperfect one, of what, in my opinion, this great subject really contains or leads up to. To state at once, as broadly as it impresses itself upon my own mind, the question we have to consider this evening, it is this: *not* whether our present system of Civil Jurisprudence does not admit of many and great improvements, — *not* whether a better one might not by possibility have been originally devised, — but it is this, whether we have not been for centuries labouring under a monstrous misrule, wearying ourselves at, boasting ourselves of, and bringing to an unhealthy refinement, a system at variance with the first principles of political and metaphysical science; — whether we have not been confiding the administration of Justice to a Judicature which, if it only faithfully applies to practice its principles of decision, *cannot but defeat* the only object which it was called into existence to effect!

This is the extent to which I am prepared to go in my position. This is the point which, with your leave, I hope to substantiate.

And if there be any Truth in what I have to state, we shall not part to-night without incurring, each one of us, a deep responsibility. We may steel ourselves against it. But we shall not be able to rid ourselves of it. However insignificant the instrument which conveys to you the suggestions, having vouchsafed to him a hearing, you will have been fixed with a notice from which you cannot release yourselves. Nay, has not this responsibility already attached to many among us? Five months ago, within these walls a great nation read us a great lesson by the voice of one of her most enterprising sons.¹ America alone, of all the countries of the earth, had appropriated, by inheritance from us, our vicious Jurisprudence. While yet in her infancy she has sent to tell us that she is freeing herself from that intolerable yoke

¹ On the 18th Nov. 1850, at a Special Meeting of the Law Amendment Society, D. D. Field, Esq., one of the Commissioners for framing the New York Code, explained to the Society its working in that country.

which still clings — alas! unloosened, — round the neck of her aged parent. Can we be insensible to such an admonition as this? Can we, who pride ourselves on being an enlightened people, refuse to ponder on these things? The whole nation groans under, and hoots at, something wrong in our Jurisprudence; something, not the mushroom growth of a day, but the inlaid evil of centuries; something which, despite the efforts of two law-amending reigns, increases and gains upon us. We ourselves have long associated to remedy it. Majesty herself, from the steps of royalty, stoops at length to commend it to the consideration of her Parliament. The Government staves off, from time to time, the popular indignation by periodical Commissions. Meanwhile a symptom is pointed out to us, sufficient to account for almost all the evils which exist; a symptom which we have never yet seriously considered, much less struggled to remove; a symptom which did not exist in our own land when its municipal law was free from the imputations now heaped upon it; a symptom which, to use the words of Blackstone, “never manifested itself in any other country at any other time.” Have we, until we have examined it, the right to shelter ourselves under a plea of the impossibility of a cure? Are we to shrink from addressing ourselves to the malady for its very magnitude? Dare we brand as chimerical, remedies of which we are but now bestirring ourselves to consider the practicability, or to disparage, when it is sought to apply it to the necessities of our own times, that which in the abstract we are the first to commend? We are instant in our cries against the state of our Law. The Statute Book teems with schemes to improve it. Year after year the Press is sending forth, from the heart of the empire to the confines of the globe, its deep and unsparing denunciations against it. We are an enterprising nation; we are a reforming generation; our national activity, intelligence, and honesty cannot sit still under local grievances, financial abuses, political immorality. No insult of the public understanding can generally be long tolerated among us. We are wounded to the quick, if aught touch our national vanity. We fire at the thought of Papal intrusion. We exhaust ourselves in

our applications of science to the general good. We pride ourselves on the progress of the human mind. We aim at a continual onward intellectual movement. And yet we lie calmly and unconcernedly in a state of forensic heathenism, and cannot be aroused to a sense of our judicial degeneracy!

Do we know — have we ever suspected, that the root of all this popular discontent, and all this national discredit, *may* lie, nay, *does* lie, in the DISTINCTIVE ADMINISTRATION OF LAW AND EQUITY?

Here lies in a nutshell the paradox. Two sets of tribunals in the same country, exercising their jurisdictions over the same species of property, dividing between them the whole administration of the civil rights of the subject, have, for five centuries, upheld, and still uphold, contradictory claims; have pursued conflicting modes of establishing truth; and, setting out from opposite data of construction, have built up a series of antagonistic and logically contradictory conclusions for the obedience of a nation! Is Truth divided? Are social Right and social Wrong words of a conventional and ambiguous import, and not rather great unalterable moral realities, stereotyped in our minds by the very light and order of Nature? Shall Justice be raffled for, a prize to him who chances to enter its Temple on the one side, a blank to him who approaches it by the other? Should it not rather be the tutelar and pervading Genius of the place which is hallowed by its name?

These are no figures of speech. Words are inadequate to depict faithfully the anomalies we bear about us, and willingly bear with. They startled us perhaps awhile, when, in early youth, fresh from the humanising influences of Academical life, we were apprenticed to the iron servitude. At first we whispered, it may be, our suspicions; then more boldly proclaimed them. Then our scruples were laughed out of us, as the humours of a fretful impatience; and tutors and great oracles of the Law pointed to the two severed structures which each generation had found and left, and to the intellectual Samsons who had lived and died among them, and relied on them as evidences of some great necessity, until it became a sign of presumption to look at them with any.

but feelings of admiration. And so faded away from many those first truthful impressions. And they went forth to the sternest and most arduous of professions, and amassed large fortunes, and led the Courts; and, amidst their brilliant successes, glorified the system which enriched them by its abuses. Yet not so of all. Some, in the eleventh hour, have returned — and some, still better, from the very noonday of their lives, have never ceased — to devote themselves to the grave great work which we are once more met to-night to prosecute. And what work, indeed, can be more noble? who so truly deserving the name of patriot, as he who, possessing either the wisdom to design, or the authority to suggest, or the leisure to execute, — nay, even the honest mind to will it, — shall direct his energies to obtain the grand social blessing of a Reformed National Jurisprudence?

I know not with what feelings you rose from the perusal of that work¹ which has again placed high in the annals of authors the name of Campbell. I confess it made me sigh for the misspent talents of our forefathers. Giants in intellectual strength, how have they narrowed the limitless character of our Common Law, lowered its true dignity, and rendered it more hopeless by the precedents which their own examples furnished, to rescue the system which they presided over from the fetters they wove for it. Was there a Law Reformer among them? Hale, indeed, might have been one, had he lived in an enlightened age. Holt, that incorrupt Judge in a corrupt reign, knew nothing of the Philosophy of Law. Mansfield's great mind could not but see our anomalous condition; but in attempting to fasten the Equitable principle on his own Court he was clearly wrong. What think you of Coke, who did more than all that went before him in swelling the cumbrous system to its present dimensions? Was that mind great, which could view with unquenchable jealousy the Equitable doctrine of Injunctions, — the best gift which Justice ever gave to man; — or which could conscientiously insist that to sue out a subpoena in Chancery to set right an unjust judgment at Law was the offence of *præmunire*? His astute and well-stored under-

¹ Lord Campbell's Lives of the Chief Justices of England.

standing was an excellent armoury for petty skirmishing; would that it had rather grasped the views which noble wearers of the Judicial ermine in our own days have not thought it beneath them to propound!

But some among you have been bred up in attachment to this same Common Law; have followed it with the zeal, and are mastering it with the capacity, of a Coke; and you are jealous of the honour of your favourite study. Do I then condemn it? Am I advancing one word to its disparagement? Far from it. The Common Law I love in common with yourselves. But what Common Law? I speak of the times when it was synonymous with Equity in its widest sense. There were such times. Look at its principles. It said, "Give each his due;" "I rejoice in Equity!" "I never do that which is INEQUITABLE;" "I aim at perfection;" "I regard the intent of parties;" "Nothing is perfect so long as any thing remains to be done." These were among its fundamental and favourite axioms. What could speak larger Equity? And yet how has it not belied itself? It has *not* given *cestui que use* his due. *It did* what was inequitable. It did *not* execute agreements that ought to have been executed. It did *not* prevent injuries; and became, in the words of Lord Redesdale, "contrary to the principles of its original establishment, an instrument of injustice."

But why this inconsistency? Whence this repudiation of its own noble ethical doctrines? The Feudal tenures did not require it, for they prevailed in other countries, where yet the Equitable owner found redress in the ordinary Courts. The Anglo-Saxon constitution had not required it; for there had existed under it but one Superior Court of Justice; and yet there never was a time when there were not equities between man and man to be adjusted. Rome had known, indeed, the distinction between the Legal and the Equitable right; but the Romans, unlike ourselves, were wise enough to see there was no need of erecting a new Court to take cognisance of the Equitable claim; and, accordingly, the same Judge who had hitherto administered the Law was empowered to apply it to particular cases by the principles of Equity. The question is solved in the fact recorded by Lord

Campbell, that "the Common Law Judges laid down rules utterly subversive of justice." They *might*, without transgressing principle, — they might, without transgressing precedents, (I speak of the earliest period when the equitable owner demanded a hearing, and demanded it in vain,) have framed their decisions on the basis of Equity. Nay, to refrain so to do was abhorrent from their own cardinal rule. They *did not* so frame their decisions; they *did so* refrain. Thence grew Chancery; being, in fact, historically, nothing more than a tribunal which the king, as *parens patriæ*, and the fountain of Justice, was, by the fiction of the constitution, bound to provide, as often as his ordinary Courts impeded that administration of Justice which originally was vested in them exclusively. But observe the needlessness of its institution. Why, if the sovereign could constitutionally authorise his Chancellor, as a new Judge, to set up a substantive jurisdiction, could he not, as constitutionally, have authorised his existing Judges to have extended their jurisdiction (if, indeed, any such extension was required), as to embrace the class of cases which they discarded? The Chancellor and the Common Law Judges were both rivalling from the same fountain, and both, if either, could have been equally well made the channel for the circulation of equitable rights.

Now, if it was to be the law of the land that the legal ownership should ultimately prevail; and that "Uses," the "impious fraudulent inventions," were to be disowned; that a man should be confirmed in an unrighteous possession; that transactions tainted with fraud should stand; and that one should bring another into a Court of Law without being responsible for any information he himself might possess essential to that other's defence, and which would instantly disentitle him to his verdict; one might understand, even one could not venerate, the distinctive administration. If it was never so. The only effect of the Severance was to make the road to justice more circuitous, and to oppose a temporary barrier to its suitors. It did not eventually deliver them from obtaining that indemnity which the Common Law said they should not have, but only rendered the means

of obtaining it more costly, intricate, and uncertain. The suitor, though denied a remedy in the Court in which he was obliged to commence his suit, might force that Court, by the help of an extrinsic tribunal, to hear the case contrary to its own rules, and to retract its previous denial!

Therefore there was no political expediency in the distinction; no imperative demand for it in the necessities of the times.

Granting, however, for argument's sake, that some show of reason did exist for it, whilst military tenures overspread the kingdom, and that the Jurisprudence of the country did assort well with the social phases of things, how altered is the case now? In 1661 "a statute was passed" (to use the expressive words of Blackstone) "more precious than *Magna Charta* itself; since that only pruned the luxuriances that had grown out of the existing tenures, and thereby preserved them in vigour; but the statute of Charles extirpated the whole, and demolished them root and branch." *Cessante ratione cessat ipsa et lex*. If the feudal tenures gave the severance birth, the cause has ceased for its continuance: and if that cause has ceased, are the root-and-branch Reformers of the Law to be overawed by arguments plucked from the barren stock of antiquity? They, indeed, affectionately reverence antiquity; they embrace its memory as dear to them; they enshrine its associations among their holiest things; but they never can be deterred, in the sight of gigantic errors, from a work of amelioration, by visionary obligations conjured up before them, not to disturb the "Past."

But, further, so utterly regardless is modern legislation of the claim of feudality to exemption from statutory interference, that every Session is obliterating the few stray mangled relics of it which survived the statute of Charles. One day copyholds are to be enfranchised; another, it tardily discovers that married women ought to be treated as responsible moral agents; then it dispenses with indispensable Common Law formularies; then infringes on great unshaken rules of evidence; now it destroys, and now restores, the learning of *contingent remainders*. Our old Municipal Law has, in fact,

long been in a sort of passage state; partly what it was, yet for the most part different; crippled, mutilated, and exposed to the assaults of every ephemeral statesman; so that, if history ever furnished a vindication for the theory of our biform jurisprudence, it has long ceased to do so — ceased with the circumstances which demolished the tenures which occasioned it. If, when our forefathers were rude, the Common Law sufficed them, when their descendants are civilised, may not Common *Equity* be needed for their guide? If, when Englishmen were vassals, mortgages were sales, why when, they are freemen, may they not be pledges? If, when a people is agricultural, land may be transferred; when they are commercial, may not debts be assigned? If, when times were troublous, trusts were an abomination; when the nation is at peace, may they not be a boon?

In a philosophical point of view, the distinctive administration of Law and Equity is, if possible, still more unsatisfactory. From the days of Mosaic infallibility down to the magnificent judgments of Solomon, whereat "all Israel marvelled" — from Solomon to the yet wiser economy of Him in whom "Mercy and Truth met together," was there never conceived a system of sound laws, which was just and not equitable, or equitable and not just. "The abstract idea of Justice and of Equity," said Aristotle, "is one and the self-same." Every scheme, therefore, of jurisprudence which excludes cognisance of the equitable element, fails of being a perfect scheme. The conclusion is inevitable: for, to point the paradox, our Superior Courts of Judicature, the sole end of whose existence in a land *at all* is to "execute justice and to maintain truth," *cannot* issue the decrees which justice demands should be issued; deal in judgments which justice forbids, and lack machinery for extricating truth! Account for them as we will — palliate them as we may — these facts stare us in the face; incontrovertible proofs, one would think, how little progress, in the nineteenth century, an enlightened nation has made in perfecting the most important of her social institutions!

The truth is, that the very question, "What is political justice?" refers us of necessity to a moral standard. I do

not speak of that class of rules supplied by the Municipal Law for the actions of men, which do not bring with them, in the nature of things, any antecedent obligation to obedience, but of those in which, independently of all human enactment, there exists an intrinsic element of right and wrong. These last, in truth, constitute the field on which men split and litigate. These are they which chiefly engage the discernment, and rack the vigorous intellect, of those who minister in high places. These are they which give controversies their edge, and lawsuits their poison. The determination of right and wrong — the limitation of that which is lawful and that which is unlawful — and the discernment of truth from error, ought to be the common office and province of every Court in our land. But the *artificial* nature of our distinctive administration is ever kept out of sight, until even the advanced practitioner begins to fancy that the Law of Nature has created it. And no wonder. The text-books which beset the student, and which profess to pilot him in his arduous career, lend perpetual countenance to this fallacy. They swarm with details which embarrass the understanding — for they are infinite: they do not present us with first principles, which are always few and simple. It is melancholy to reflect upon the prodigious amount of learning which has been thus wasted by men of the politest minds, who have taken their stand upon the severance between Law and Equity, as a sort of mathematical first principle, which it would be folly to challenge. Why, when we think of the profound lore of a Comyn, the sterling strength of a Sugden, the erudition of a Hargrave, a Maddock and a Story, and the classical genius of a Fearne, who could invest with a literary voluptuousness the ugliest refinements of *contingent remainders* — who will not lament that they should have lent their talents to tasks so thankless, and toiled in a cause so profitless?

And so of our Law Reporters. If I see them handing down to posterity, as the intelligent recorders of our own transitory age, some invaluable principle of jurisprudence, I admire and respect their labours. But when I view them as the self-doomed annotators of some microscopical technicality

or puny point of differential practice, or some fatal flaw in a deserving suitor's cause, and think that the volumes they periodically send forth are so many bulwarks of that system which we are assembled to AMEND, then I am compelled to regard their calling as one of the foremost obstructions to the progress of a healthful jurisprudence.

But not only is the distinctive administration of Law and Equity arbitrary and unphilosophical in its creation, unsupported by antiquity and universal history, and unreasonable in its continuance beyond the period when the reasons ceased which explained, though they did not justify it — *it is productive of the greatest social evils.*

Of that vast array of cases, the essential feature of which is Trust, and which has now so multiplied that it affects by far the largest portion of the property of the country — of all that numerous class in which nothing short of *specific performance of agreements* is justice — of that still more motley group, comprising every variety of interest in the literary and scientific, the commercial and manufacturing, and even the agricultural world, in which *prevention* is justice; — of that again of which the pervading idea is a conscientious obligation — or those where the evidence of a party to the suit is required, the Common Law Courts, as is well known, take no sort of cognisance whatever. Are these, then, tribunals fit to arbitrate on the Real Property of a country? Is this meting out justice to a people? It is no reply to say, "There is Equity open to you; your wants may be there supplied. Flee thither, and no *eventual* injustice ensues." I answer, that what Englishmen have a right to require is not an indirect, but a direct, dispensation of justice; not an unwillingly *extorted*, but a spontaneously *accorded*, measure of right; not a twofold, but (if there must be any) a single-handed and decisive litigation. I answer, that the birth-rights of the people should be administered in as liberal, as uniform, as costless, as intelligible, and as speedy a manner as possible; and that no narrow rules, no diversities of practice, no hair-breadth subtleties, no nice balancing, of jurisdiction should interpose between them and the simple avenging of their wrongs.

But look at it another day, and you will find this variable chameleon-like creature, Common Law, encroaching on the province of Equity, imitating her maxims, and arrogating to itself what it terms a *concurrent* jurisdiction with her. So that, what between this alternate deafness to the most palpable necessities, and this capricious entertainment of even doubtful claims, it has not the slender merit of being consistent in its eccentricities. To classify the evils of Severance, it may be, with truth, affirmed that they come under one or other of the following heads. Either two lawsuits are rendered necessary instead of one, or else a suitor is compelled to accept a dry inadequate *legal* redress instead of that more extended one which Equity would give him, and to which he is, of right, entitled; or else he may easily lodge his complaint in the wrong Court, owing to that confusion of boundaries which we must always expect to find where man has parted, by an inappreciable barrier, what Nature and Reason have willed to be inseparable.

Again, is it no slur to our system, that each branch of the same profession should be labouring at a study of which the other confessedly knows little; that a Common Law practitioner should be ignorant of the rudiments of Equity, and an Equity draughtsman be lost in the mazes of special pleading? And if we look further onward to the occasions when the great prizes of the profession have to be allotted, when the law officers of the Crown are to be appointed, or the question is, who is fit occupant of the "marble chair," how still more apparent is the evil? Do we not see enough to condemn our divorced judicature — our Law divided against our Equity, and our Equity against our Law, in the single fact, that the greatest possible difficulty is, and always may be, found, so long as that divorce remains, in choosing a competent Chancellor? The Common Law is ransacked — and how often ransacked in vain — for a man who knows something of Equity. The Attorney-General perhaps never held a brief in Chancery. The Solicitor cannot be promoted above the head of his superior. No political partisan is to be found among the ranks of Chancery. The Chief Justices never practised at that Bar. But take a larger and nobler

are still standing but on their threshold, — is it presumption to say that it may be reserved to our own generation, or even to our posterity, to lay the corner-stone of the true theory of a National Jurisprudence? After all, what is the extent to which the argument from Authority can legitimately be pressed? Taken at its utmost, it can only bring with it the obligation to suspect, scrutinise, suspend, private judgment; but it never can justly usurp the province of that reason which, feeble and imperfect though it be, is implanted in us, as a guide and judge in the last resort, to steer us among the problems of political philosophy.

In the next place, our present system will be defended on the ground of the *division of labour* which it presents. There would undoubtedly be much force in this objection, if the two jurisdictions were wholly ancillary to one another; and each contributed its share to the one great common end — the promotion of Justice. But the tests of a right division of labour seem to be the following:—The product must be thereby produced more quickly, more cheaply, more surely, and be better of its sort. It is so with the trades. But such is not the result in the principal case. Unless a two-fold litigation is speedier than a single-handed one; unless the proverbial delays, uncertainty, and impoverishing effects of a lawsuit mean nothing; we have not much reason for self-congratulation on this score, at the gulf which yawns between Law and Equity. As Mr. Hayes well observes, “the complication inseparable from the advanced state of society has been aggravated by the double aspect of our jurisprudence.”¹

Thirdly. We shall be met with the party cry of “damage to the Profession.” To this allegation, if true, a sufficient answer seems to be contained in the words of the great oracle of the Common Law, “*lex vult citius privatum damnum, quam publicum malum.*” If a few have prospered at the expense of the many; if they have thrived on the misery of a multitude, the sacrifice of their interests can hardly be deemed a balance to a catholic blessing. But I am at a loss to perceive how any would be really greater gainers

¹ Hayes's Conveyancing, p. 122.

by the change than the Profession itself. Not to dwell on the unworthy contests with trivialities, the needless logomachy, the painful uncertainties and conflicts of judgment, which they would be spared — if there be one class of the community more than another whose honourable delight it should be to easily disentangle truth, speedily redress injuries, see Right infallibly prevail, and Wrong infallibly crushed, to render justice accessible to the poorest suitors, and make the mighty fabric of our Municipal Law stand well with the affections of and homage of our people — *as it does not now* — surely it is that one which has deliberately chosen for its own this the noblest subject of human enterprise.

Fourthly. One more objection I have heard, and that from so eminent a member of this Society, that it deserves to be treated with respect. It is asked, how the Common Law Judges are to become suddenly imbued with Equity, and competent to adjudicate on a jurisdiction taking cognisance of equitable matter?

But this objection does not come well from the lips of any one who is not equally prepared to object, for the same reason, to our present system, according to which Common Law Judges *are* suddenly summoned from among their brethren to figure on the Equity bench, or who agrees with Lord Truro, that “not only would he [the Common Law Judge] easily become acquainted with the rules of practice, but he is already familiar with the great principles of Equity, *which are frequently under discussion in the Common Law Courts*” (!) Granting, however, that *some* training *would* be requisite to wean an inflexible Exchequer Baron from his idolatry for special pleading, the difficulty would be short-lived. The rising generation of lawyers would be concerned only with text-books adapted to the combined system, and every day would be gradually maturing the transition.

In an address like the present, where my object is chiefly to insist on the anomalies of the severance between Law and Equity, and to show how, without violence to constitutional predilections, without running counter to the current of antiquity, without contradiction to the nature of things, but with

¹ Vide the Lord Chancellor's Speech in the House of Lords, March, 1851.

everlasting benefit to society, FUSION is the only remedy for these anomalies, it will not be expected that I should discuss at any length the practical mode in which that fusion would be best worked out. It would, in fact, be premature to do so, until you have assented, as I hope and believe you will this evening, to the need of it at all¹; it would, perhaps, be irregular to do so while that part of the subject is still under the consideration of your Committee. But I may be permitted to observe, that Unity of Principles can only be advantageously carried out in conjunction with Uniformity of Procedure. That such an Uniformity is practicable, can admit of no manner of doubt. As to what, indeed, shall be its precise character, many differences of sentiment will arise, differences to be accommodated only by patient and laborious deliberation, and much mutual interchange and concession of opinion. Thus much, however, seems apparent, that *if* either of the existing procedures are to be preserved, the Common Law method, as a whole, is preferable; for it is not the least remarkable feature in the whole of this extraordinary case, that Equity has adopted the worst discipline to develop the best doctrines; and the Common Law has joined a more sensible practice to the most illiberal precepts. It is this misjoinder, so to speak, which has prevented Equity from becoming the really beneficial mistress, and saved the Common Law from being the intolerable nuisance which they would otherwise respectively have been.

And yet, is it not possible that a better model may be adopted than any which is exhibited by either Equity or Common Law? Is it not possible that the procedure of our civil suits may with advantage be placed on the footing of the practice which now obtains in Criminal Courts? Surely these last, as they are conversant with the gravest classes of cases, so have they lighted, it is reasonable, *à priori*, to infer,

¹ The First Report of the Special Committee, appointed at Mr. Bethell's suggestion for considering the Policy of the Distinction between Law and Equity, had been lately made, and stood for consideration by the Society this evening. This Report is printed in 14 L. R. 152. There had been a previous notice given by Mr. Trower (Nov. 19.), in the following terms:—"That the distinction of principle and procedure between Law and Equity in this country is an artificial and senseless one, and productive of great social evils, and should therefore be abolished."—ED.

on the wisest scheme of procedure. And so, *in fact*, we find it to be. That procedure carries with it, as a whole, the approval of the entire community. There is, perhaps, no department of law which is more nearly free from serious and fundamental objection. But there is no magic in words. Whether the case be called a civil or a criminal one, it is equally *a suit*, demanding a logical extrication of the law and facts involved in it, and the application of judicial adjudication. In the one case, our Constitution is pleased to consider the wrongs as between the Crown and the subject; in the other as between subject and subject; but this, like the distinction between Law and Equity, is evidently an arbitrary definition. If civil suits require pleadings, so do criminal cases; if criminal cases dispense with them, so may civil suits. The depositions in the one are both the pleadings and the evidence too. They perform the office of pleadings in raising and recording the issues to be tried, at the same time that they present the Judge with the proofs. If they answer this double purpose in the one case, why should they not also in the other? If a single unprofessional Judge, or Bench of Judges, may arbitrate, in his own library, or at Petty Sessions, without the logomachy of pleadings, properly so called, and with satisfaction to the public, upon so precious a matter as the liberty of the subject, why may not a professional Judge be equally enabled, without them, to rectify a marriage settlement, cancel a fraudulent bond, dissect a case of "account," or restrain the infringement of a patent?

In fact, the necessity of written pleadings, *at all, as the integral part of a suit*, was abandoned by the very principle of the County Courts' Act. That was, indeed, a great way to go, *but we have gone it*. And whilst that principle stands admitted on the Statute Book, and is in daily action, with universal approbation, in a multitude of cases, we cannot decry, as absurd, the possibility of its universal application. For it would be a great mistake to suppose, that the number of issues, either of law or fact, in any given case, depends on the magnitude of the property involved. We cannot arithmetically limit them. A small suit may often be found to contain the most, and the largest the fewest. We doubt the

necessity of written pleadings *in any*, the instant we find they are capable of being dispensed with with advantage *in some*.

The paradox of requiring them in friendly suits has at length become recognised. "Pleadings," says Blackstone, "are the mutual altercations between the parties to a suit." Yet such have been the incredible shortcomings of our juridical system, that men's minds are only now tardily awakening to the absurdity of exacting from those between whom no animosity has ever existed, all the "pomp and circumstance" of hostile proceedings! Let us hope and strive, that, having so long cherished error, and at length acknowledged it, in the one case, we may not be insensible to our liability to it in the other.

Finally, if any thing I have said comes home to the conviction of any present, let me entreat them to entertain it, until we have obtained something *Practical* and *Parliamentary* from our deliberations.

As, on the one hand, we must expect all manner of obstruction in conducting it to a prosperous conclusion, and shall have much need of caution, patience, and discretion, so cannot so great a revolution be effected without the equally necessary habits of courage, energy, and resolution.

Think what it is to persuade a whole nation! Think what it is to extract from them the confession that their dearest institutions have been based, and carried on, for centuries in error! Think what it is to eradicate, from even a single breast, deep-seated, life-long, prejudices! First, then, *we must popularise* our subject; for, greatly as it concerns all classes of our people, though none is so lowly as by reason of his meanness, none so exalted as by the greatness of his station, to be indifferent to it, it is one still so little understood with any amount of clearness, that, whilst men blazon its abuses, as in a proverb, they shrink from mastering it for its very magnitude, and found, on the tenacity of the evil, an argument for its inviolability! Next, *we must respectfully agitate* for it. *Agitate*, by imploring Parliament, by entreating our influential members to raise their strong arm of rank and power, and uplift their tongues of eloquence, in its behalf. *Agitate*, by obtaining, through the length and breadth of the land, the cordial co-operation of our intelligent

fellow-subjects. Nor should our fears be great, nor our hopes contemptible, when we reflect that we are guided by one, who, having himself administered the Supreme Judicial Office of State, now in the comparative repose of a less public sphere, has chosen Law Reform as his peculiar and favourite work; and, shielding us with the protection of his name, has obtained respect for our proceedings, and set us right with the public as a band,—not of crude and desultory amateurs, but of practical and determined reformers. Under his chieftainship may we not hope to see the day—nay, already do not the most thoughtful amongst us descry its dawn in the horizon,—when, disentangled from the fetters which have so long bound it, and disencumbered from the grave-clothes which have wrapped it around, the Spirit of EQUITY,—which is the perfection of justice,—shall walk forth among us in the land, and Law and Equity kiss one another in the embrace of a hallowed union!

Like that fair decoration of mediæval architecture which grew, *uniform and alone*, out of the intersecting materials of the ruder elder arch. Or, like those beautiful results in Chymistry, wherein, by mutual affinities, whole natures take up and pervade one another,—differences are given off, and new compounds are obtained, astonishing with delight the philosopher in his retreat, and enriching Commerce herself with the trade and wealth of nations!

ART. IX.—PROGRESS OF LAW REFORM IN SWEDEN.

[WE have been favoured with the following letter to Mr. D. D. Field from Professor Bergfalk, Professor of Law in the University of Upsala.]

David Dudley Field, Esq., New York.

Stockholm, 22nd September 1851.

“DEAR SIR,

“You demand of me an outline of the progress of Law Reform in Sweden; and you demand it as complete as a due

consideration of your time will allow. Such a demand from one of the distinguished Commissioners on Practice and Pleading in the State of New York, is too flattering not to be complied with; and truly happy would I feel if the sketch I am now about to give would answer your wish.

“ Considering I am writing to a gentleman of the North American Bar, I think it will be well at the very outset to state, that in Sweden we do not know any thing like the English difference between *Common Law* and *Equity*. There was certainly in the ancient Swedish law a rule analogous to that in which the English Equity originated, namely, that the King had power to search for the truth in every action, and to set aside every verdict and every oath of a defendant with his compurgators or other evidence, when cause was shown, as also every harsh or imperfect judgment, although not appealed from. But as we have never had in Sweden a narrow system of actions at law, like the English, the rule just mentioned did not, and could not, in Sweden, pave the way to any thing like the English difference between the two jurisdictions. Indeed, there have never been in Sweden private rights, of which notice has not been taken in the Courts at Law, but which have been left to be exclusively dealt with by the King or some keeper of his conscience. Nor was a distinct system ever thought of in Sweden of relief to be administered only by the King or some conscience keeper, nor any distinct system of procedure for suits submitted to him; although I am not prepared to deny that the use of torture, unknown to the ancient Swedish law as to the present, but not unheard of in the sixteenth, seventeenth, and part of the eighteenth century, may be traced to the King's power to search for the truth in every action; because it is at least probable that the torture was first made use of in prosecutions for treason, in obedience to royal command, and not until later in other prosecutions. At present no such searching and annulling power is held by the King, if you will not consider as such his power to pardon criminals. With exception of that, all the judicial power of the King is now vested in a *Highest Court*. It has certainly powers, where cause is shown, to set aside a judgment, although

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neither an appeal is taken nor a re even although neither appeal could asked ; but the action is, when that use of, brought before the Court, aside, and the procedure is the same there for the first time.

“ Nor do we at present in Sweden English *Common Law*, as opposed law is *Statute Law*, and has been so also we are good Protestants, who dition. In fact our most ancient of the transition from the system *Statute Law* ; and when, from below, a new Common Law was long before it also was absorbed

“ And now finding myself, brought into the midst of the history of retrace my steps, in order to comment, and give something like and progress of the Swedish law

“ Sweden, although the number even now exceed 3,500,000, Middle Ages, as France and Germany is still, divided into kingdoms¹, and bound together the precise nature of which partly by affinity, all the in the far north excepted, below races, *Goths* in the south, and northern parts, and then nearly related.

“ And when those petty before the ninth century, only change of their relation of a federal government

¹ The same was the case in Denmark only 1,400,000 ; and in Denmark are but 1,800,000. Some part Norwegian or Danish.

solidated one and a mere league, instead of such a one. *One nation*, with a common national feeling, and a consolidated government, the Goths and the Swedes proper did not become before the struggles of the fourteenth and the fifteenth centuries. Until then the ancient kingdoms, called provinces after the union under a common king, retained not only sectional feelings, but a part of the sovereignty, in some respects equal to that of the several States of the North American Union, in other respects greater. The power of granting taxes, even for the wants of the whole country, and of making laws was, until then, vested in the provinces; and the first of those powers was still longer warranted to them by law.

“One chief cause of the legislative power being retained by the provinces as long as it actually was, is certainly to be found in the intimate union of that power with the judicial, that last power being considered as eminently provincial.

“In the early part of the period of provincial independence it can even be said that there was no other legislation, than the finding of judgments, and they were, since the extermination of the petty kings, at first the work of the assembled people.

“That rude state of things could not, however, last long. The litigation becoming more frequent, and its objects more complex, the finding of judgments could not be every man's business; and so men, who had paid more constant attention to those things, did, little by little, become more important in judicial meetings, until at last in every province one man was elected, whose duty at first probably was, whenever the people were at a loss how to decide, to inform them what was right, but who soon became obliged, 1st, without waiting for a special summons by the people, to find judgment in all actions brought before the judicial meetings where he was present; and, 2nd, once in each year to recite before the assembled people the established principles of law, and thus became at once the province judge, and the provincial legislator¹, the people reserving to itself the final ratifications

¹ The Swedish denomination was “man of laws;” the Latin was *legifer*.

only of those principles by acquiescing in them. The legislation was then separated from the finding of judgments; but the judicial power remained united with the legislative, and a judicial power, in hands which did not hold the legislative, was not established even when county judges, who, at the end of the fourteenth century, were to be found in most of our provinces, were in the thirteenth, or perhaps still earlier, elected in those situated in the middle part of the country; because those judges were then and long time afterwards in fact nothing but substitutes of the province judge.

“The principles of law annually recited by the province judges are the most ancient law of which we know anything in Sweden. They were of course a true Common Law. The form of the recital was poetic, the only natural one for that state of civilisation, and the fittest for inculcating the principles in the popular memory, but at the same time fit only for brief and expressive rules. When abstract reasoning and prolix commentaries began to encroach upon the poetry, and still more, when they overwhelmed it, other means of preserving the legal traditions became necessary. Those means, reduced to writing, were first made use of by the clergy, who alone knew how to write, when the want of those means for the conservation of our law was at first felt. Their first attempts in that way were, however, not very valuable, because they did not embrace the whole Common Law, but the parts only in which the clergy took a peculiar interest; the first, of course, being that whereby Christianity was established as the religion of the land, and the privileges of the clergy were defined and confirmed¹, and the second, the political²; but when those parts were writ-

¹ In Denmark the bishops took care that this part of the Provincial Common Law was not only reduced to writing, but also passed by the people, and approved by the king, as early as the twelfth century, although the other parts were not reduced to writing before the thirteenth.

² That part is in some order confined to some penal enactments for protection of certain persons, places, or occasions, and so forth; which certainly partake very little of a political nature, but must be referred to that class, being the nucleus, around which grew forth, in other codes, partly the law of taxation, partly a pretty complete political constitution. The last was the case in the provinces, which were nearest to the seat of the national government, and the

ten, the clergy had become interested in accomplishing what they had commenced; and so the work went on; and about that time laymen also were able to perform for themselves what the clergy alone had before known how to do. Some parts of the Civil and General Law were probably written already in the twelfth century; and early in the thirteenth there was at least *one* complete provincial code, ecclesiastical, political, civil, and general¹, written, probably, by the province judge himself.

“ That reducing to writing did of course not give us a Statute Law instead of the ancient Common Law. The most of the provincial codes belong to the category of Common Law as much as the oral recitals of the province judges had done. They are, in fact, mere collections of principles, as recited by the province judges, compiled either without any authority at all, or under the direction of the province judge, and were, when made or approved by him, certainly also used for the annual recitals, but want any other sanction by a sovereign-people or King, than the acquiescence of the people.

“ Two, however, of those provincial codes are true Statute Laws, passed by meetings of the people in the province, and approved by the King, whose sanction is given by letters affixed to the codes. The one of those codes was approved in the year 1296, and the other in 1327. And the idea, with which we meet here for the first time, that something more than the statement of the province judge and the acquiescence of the people, was needed for making a law which was duly recited and acquiesced in, had hardly been announced before it took hold on the public opinion, so that the old legislation soon ceased altogether, and no Code after the year 1347 came in use, without being approved by the King after approbation by the self-made representatives of

codes of which were sanctioned by the king. In our Code a sort of political constitution is to be found, without any law of taxation.

¹ In Sweden the enactments on civil and criminal procedure are embodied in the civil and penal code, although, of course, as a distinct part; and so, when I speak below of that code, without qualification, I wish it to be distinctly understood, that I am speaking of it, as embracing also the enactments on procedure.

the people, the aristocracy, although there are certainly some Codes of later date wanting royal letters of sanction.

“ Such a change could not be brought about, such an idea would not have been received in any province, still less have got general currency, without being favoured by a coincidence of circumstances; and there were in fact such circumstances.

“ The first was the example of the cities and of Norway; in both of which the King was the source of the law.

“ As to the Swedish cities, it is true that our most ancient, particular city codes, want formal letters of royal sanction, even as the common city code, of the fourteenth century, did a long while; but it is not the less certain that they were given by the King; and the reason why such letters are wanting is simply this, that it did not occur to any one that a city code could have any other source than the pleasure of the city's patron who, in Sweden, at least in the end of the thirteenth century and in the fourteenth, was no other than the King.

“ City laws were scarcely thought of in Sweden until the commercial intercourse with the middle parts of Europe had crowded our cities by foreigners, particularly Germans, who, ignorant of Swedish law, and unwilling to learn it, wished, and ultimately prevailed upon the native inhabitants also to wish, a German independence of the province and its Common Law, and bought that independence by a thorough dependence on some patron, who then imposed the law.

“ That view of the position of the Swedish cities is amply confirmed by the most ancient of our city codes. It does explicitly tell that it was given to the city of *Wisby*, in the island of *Gottland*, first by a German emperor in the twelfth century, when the island's dependence on Sweden was very precarious, and afterwards confirmed by one Swedish King, already before the sanction of the Provincial Code in 1296, and again by other Swedish kings about and after the time of that sanction; and the tenor of the second of our particular city codes is also that of deference to the King, showing plainly its source.

“ The example of the Swedish cities was certainly the

nearest; but that of Norway, where the King had for centuries been considered as the true source of law, except perhaps the ecclesiastical part of it, was also contagious, the Swedish prince, who was chosen king of Sweden in the year 1319, and held the government until 1363, being also during the whole of that time King of Norway by birthright, and Norway being besides near to Sweden, and part of the same peninsula.

“ The second of the circumstances alluded to, was the weariness of the people, and the ascendancy of the aristocracy and of the royal power, caused by a protracted civil strife and the general wish for an end thereof, and for a strong, consolidated government. That circumstance was certainly the most efficient in giving currency to the idea, that even in the provinces the King was lawmaker, and it went besides far in sustaining the King when he made use of his pretended legislative power for a new purpose.

“ That purpose was the introduction of a Common Code for all the provinces of Sweden, and of another for all the Swedish cities: the first impulse to which was certainly given by the example of Norway, where a Common Country Code had been introduced instead of the four Provincial Codes as early as 1274, and one Common City Code instead of the particular codes in 1276. (In Denmark the Province Codes were not superseded by one Common Code before 1683, twenty-three years after the power of the aristocracy was broken.) It would of course strike the King of Sweden and Norway, who reigned 1319—1363, that such a substitution of Common Codes, instead of particular ones, in Sweden ought to go far towards tightening the union of the several provinces; and the people, tired by the long civil strife, seems to have been, or soon become, of his mind.

“ Commissioners were appointed accordingly for reporting a Common Country Code; and when reported it was also, as we know from a letter bearing the date of 1352, promulgated by the King, although the clergy did protest against some part of it; and, as we know from other sources, it came also in use, first among the Swedes proper in the middle and northern Sweden, and about forty years later among the

Goths. The only effect of the clerical protest, which was submitted in the year 1347, was, that the ecclesiastical part was left out of the Code, as it had been in Norway seventy years before, and that ecclesiastical matters were decided according to the older codes. And a short time afterwards the Common City Code was also compiled from the then existing particular codes with amendments, and went immediately into use, since it had been promulgated by the King, as his successor expressly tells in a letter given in the year 1365.¹

“By the promulgation and reception of those Common Codes, and by the prevalence of the Ecclesiastical Code of 1296 in ecclesiastical matters, there was an end made at once of the provincial legislation and of Common Law in Sweden, and from that time downwards to the present no such law has been able to grow in Swedish soil, except for some time in the seventeenth century, when the necessity was too strong to be overcome by opinion. That necessity was brought on us in this way: Sweden was far from being, as it was expected, pacified by the legislative labours now mentioned. From the midst of the fourteenth century until the third *decennium* of the sixteenth, the civil strife raged with unabated violence, fomented by foreign powers. As long as that strife continued, the authority of the law was too often obliged to yield before that of the sword; and at the end of that gloomy period a great deal, not only of the enactments, but of the language also, of the Codes was forgotten.

“An instantaneous thorough remodelling of them was not then to be thought of. The ecclesiastical part could not be remodelled before the Reformation was firmly established. An attempt to remodel the political part would have given occasion for calling in question the arbitrary power which the King and the aristocracy did, both of them, exercise, which neither would relinquish, but neither could hope to have sanctioned by a new constitution. And as to the Civil and Penal Code, men fit for a remodelling of it were not to

¹ A formal letter of sanction was not affixed to either of those common codes. The Country Code was, after some changes made in it, set off with such a letter in the year 1442. The City Code was not in the same way provided for until 1618.

be found in a time of such decay ; and the work, even had it been feasible, would have been of little value, as long as the people continued to pay more obedience to the strong and the wealthy than to the law, and as long as there were so few judges able to perform their duties as they ought to be performed. The most efficient remedies, which would for the moment be made use of against the evil, were, a better religious and moral education of the people, a strong government, and courts able to command the esteem of the people, and successfully to settle the true sense of the codes.

“ The improvement of the education came as a consequence of the Reformation. The progress was slow, but steady, in the sixteenth century, faster in the seventeenth. The strength of the government was considerably increased by the energy and popularity of Gustavus Wasa (1523—1560), Charles IX. (1592—1611), and Gustavus Adolphus (1611—1632). The Courts were, on the contrary, a long time left as they were. That reform was the last of all, which was to pave the way for a thorough Law Reform. And, notwithstanding it was thus postponed, the first serious efforts to accomplish it did, although nowise precipitated, meet with little success, owing, in some part at least, to the aristocracy, who had themselves been the principal agents in destroying the dignity and the efficiency of the Courts, through the greediness wherewith they had seized upon the judge’s salaries.

“ The Province and County Judges in Sweden were of old municipal officers, as can easily be understood from what is already told. At first elected by the people, they ought, according to the common country code, be appointed by the King, he being bound to appoint one of three candidates nominated by electors, who were themselves elected by the people of the province or the country. But the province Judges were perhaps never, and the County Judges soon ceased to be, appointed in that way.

“ The aristocracy, whose power was then fast growing, had an obvious interest in strengthening its ranks by the province judges, whose office gave them a vast influence on the people ; and so it became a rule, that those judges, of whom several had already been admitted as members in the senate,

ought, in virtue of the office, to be members of that body. That rule led directly to another; namely, that of their appointment by the King, without any previous nomination, because their membership of the senate being considered as the most important office, and the judicial duties as something secondary, they ought, of course, to be appointed as other senators.

"The province judgeships had always been conferred on men of high standing only, and often, before the period of which I now speak, on members of the aristocracy, but these did then nevertheless consider themselves as the servants of the people. Now these offices were conferred on members of the aristocracy only, and as part of their birthright. The consequence was that the province judges did cease to consider themselves as men of the people, and considered themselves only as members of the aristocracy.

"That consequence was certainly bad enough in itself, but became more so through the possession of the county judgeships, which the aristocracy about the same time acquired.

"The aristocracy, who relished the ample salaries of the province judgeships, took also a fancy for the county judges salaries also, and obtained them by prevailing upon the King to appoint county judges also without any previous nomination. That proved the ruin of all legal knowledge. The intrusion of the aristocracy in the province judgeships alone would not have caused such an effect. The high-born aristocrats were of old accustomed to covet those offices as a sure road to distinction and power, and to consider the personal attention to their duties as nowise derogatory to aristocratic dignity. They would not have ceased to consider it as such, but would on the contrary have attended to those duties, and been ambitious to perform them well, or to depute able men thereto, when their own senatorial duties made such a substitution necessary,—if they had not got the possession of the county judgeships. That possession did, however, change their sense of a judge's duties altogether. It had, of course, never been the intention of the aristocracy to attend in person to the duties of a county judge. Of those offices they

would only receive the salaries, and leave the duties to be attended to by some deputy whom they hoped to find without much trouble. And since *that* custom was firmly established, and the power of the aristocracy also safe enough without the support of the influence that would be obtained by the personal attention to the duties of the province judges, those duties also were left to be attended to by deputies; and in the choice of those deputies less care was taken, until, at last, dignity and legal knowledge became as scarce in the Province Courts as it had before been in the County Courts.

“ That was the state of things about the year 1520; and it will be amply sufficient to account for the difficulties with which the first attempts of the reformers of the courts of justice had to contend, as far as the aristocracy was concerned.

“ Two attempts at such a reform were made in the years 1540 and 1560, but neither of them was popular. They were soon abandoned. Charles IX. (1592—1611), in whose ardent mind and rich genius originated, besides the great designs which he executed himself, also nearly all those executed by his son, Gustavus Adolphus, and Axel Oxenstjeran, was the first who seriously went to that work. He set about it with his customary energy of purpose; and although he did not attain his aim, to him belongs, nevertheless, the honour of having shown how the thing was to be done.

“ The first object of his exertions was the abolition of the original jurisdictions, which the higher courts exercised, concurrently with that of the inferior, and the organisation of the Court which was to exercise the King's judicial power, but did not exist anywhere else than in the Code; and the object was worthy of the precedence given to it.

“ The people, when they found the County and Province Courts, in consequence of the aristocratic usurpation, quite incompetent to their duties whenever there arose an intricate question, or one in which some powerful man was interested to defend the wrong side, and when there was no higher Court where redress could be obtained, resorted to the King

immediately whenever the question was of some importance, and they could afford to come all the way to his place of residence. The Inferior Courts, already contemptible enough, became thereby, little by little, more insignificant still, and the King was overwhelmed by business which could be despatched by a court of justice only. Already, in the year 1491, it had therefore been enacted, that no action should be brought before the King which had not previously been decided upon by *one* Court, if in a city, or by the *County and Province Courts*, if in a county, nor without an appeal taken from the judgment of the City Court or the Province Court. It was in vain. The people went on resorting to the King immediately. Then Charles IX., in the years 1593, 1598, and 1602, prevailed upon the Senate and the Legislature to make another attempt. It was enacted, that every action in a county ought to be brought before the County Court, from whose judgment an appeal was allowed to the Province Court; and that an appellate jurisdiction only, on appeals taken from judgments of the Province or City Courts, ought to be exercised by the Court entrusted with the King's judicial power. But Charles, at the same time, fully appreciated the necessity of another organisation of that Court.

“ The King's judicial power was by the common code of Magnus Ericksson (that of the fourteenth century) entrusted to a Court of Assize, to be held in every *county*, when it was the pleasure of the King or of the man by him appointed. That institution proved of no avail; and although it was nominally retained by the amended code of 1442, that code did, in fact, entrust the King's judicial power to another Court, to be regularly held once a year in every province, and to be composed of the province judge, the bishop, two senators or other good men and true, chosen by the province judge, and two members of the bishop's chapter, or other good men and true, chosen by the bishop. But even that Court had only a nominal existence, the presiding officers being too great men, and too busy in other things, to attend regularly to such a duty, and, finally, caring not at all for it. Cautioned by those examples, Charles perceived that the exercise of the King's judicial power would be quite as

neglected as before, until it was entrusted to a *Central Court*; and so it was enacted in the years 1598, 1600, and 1602, that this power should be vested in such a Court, composed of the senators and (as it was enacted in 1598) *all* province judges, county judges, and bailiffs, together with some others, or (as it was enacted in 1602) the province judges and county judges, *who were ordered to attend*. There ought to be one term for two, (as it was alternatively enacted in 1602) in each year, when that Court should review every judgment, from which an appeal to the Court was lawfully taken, in whatever part of the country it were pronounced. Those enactments did, however, not take more effect than the behests just mentioned of the codes. The aristocracy did not like Charles, nor a Court which was likely to be under his immediate influence; and the people were indifferent to the institution from fear of new taxes. But when Charles, in the year 1603 and 1604, entrusted his judicial power to commissioners, summoned to attend at his temporary residence, the aristocracy was aware that resistance to the organisation of a Central Court would be in vain; and when Charles, later in the year 1604, recommended the organisation of a King's Court, to be held wherever the king actually resided, and to be composed of the Minister of Justice, or the Secretary of the State (Chancellor was the word), and twelve, or, at least, seven province judges and county judges, whom the minister or secretary was to choose, the senate made only some very judicious objections:—that the terms ought to be two in each year,—that the place of holding them should be the capital of the country,—that the assistant judges should be chosen by the king, and that no torture should be used. Charles did nevertheless take offence, and gave up the whole matter in disgust.

“What he did not succeed in was, however, accomplished by his son, Gustavus Adolphus. In the year 1614 the ancient enactment was repeated, and then with effect, that every action ought to be brought before the County Court, or the City Court, and that the Province Court was only to review, upon appeal, the judgments of the County Courts;

and, at the same time, there was a King's Court instituted, which, some few matters excepted, was only to review, upon appeal, the judgments of the Province Courts, or City Courts, to review sentences of death pronounced by Inferior Courts, even when not appealed from, and to report to the King before execution, sentences of death, whenever they were pronounced by Inferior Courts, or by the King's Court itself¹; and, lastly, to control the Inferior Courts generally. That Court was composed of permanent Judges. The times and the place of holding them were determined in accordance with the advice of the senate in 1604, and the torture was not allowed. The idea was, however, that of Charles IX., and few institutions have as well as that kept the promise of the authors.

"The primitive intention, that the King's Court should be the highest tribunal of the country, wielding the King's whole judicial power, was, however, soon changed. The change commenced by the very first commission of the Court, and was accomplished in eleven years.

"In the commission just mentioned the King did reserve to himself the ancient power to search for the truth in every action; and in the year 1615 he also reserved to himself the power to set aside every harsh or imperfect judgment, and allowed every one who thought himself wronged by a judgment of the King's Court to ask for a revision by the King.² That change was certainly important by itself, but did not, however, lessen the rank of the Court, as long as the King revised its judgments, without entrusting that task to another tribunal. And thus was the revision made as long as there was only one King's Court. But when it became evident that a single King's Court would not suffice for reviewing all judgments, from which appeals were taken to it, and more

¹ In some cases it was, however, allowed to execute the sentences of death, without review by the King's Court, and without previous report to the King. Now no sentence of death is executed before it has been reviewed by the *Highest Court*, and reported to the King.

² In the year 1662 the difference between a petition for revision and an appeal was expressly defined, so that the petitioner could not produce any evidence which he had known before without making use of it, although the appellant had leave to do it.

such Courts were instituted, then the revision was entrusted to a body of high officers, who thus became the highest tribunal in the country; and the King's Courts descended then to the second rank.

"The second King's Court was organised in the year 1623 and the third in 1634; and already, in 1625, the revision of the judgments of the King's Courts was entrusted to the senate, who then became the highest tribunal of the country. Towards the end of the seventeenth century the task was entrusted to a delegation of the senate, and in the year 1789 when the senate was abrogated, to a *Highest Court*, which is in existence even now. The line of distinction established in 1662, between a petition for revision and an appeal, is long since antiquated; and in criminal prosecutions and some civil actions there lies also an appeal to the Highest Court from the King's Courts.

"The worth of the King's Courts was not lessened by the lessening of their rank; but that change gave us no less than four instances for civil actions generally¹ when they originated in a country, and sometimes even when they originated in a city. The remedy first thought of was, to allow some appeals to be taken directly from the County Courts to the King's Court. Another remedy was, according to the advice of a subordinate officer in the executive department, *Cedestrolm*, tried by Charles XII. in the year 1718; namely, the abolition of the *County Courts*, and the vesting of their jurisdiction in the *Province Courts*. But, since the County Courts were restored immediately after the death of Charles, we continued to have our four instances until 1849, when the *Province Courts* were abolished, as also were the Courts below the common City Courts, which were organised in the larger cities.

"The second object of Charles IX., in his exertions for the reform of the judiciary, was the enforcing of the obligation of province judges and county judges to attend in person the duties of the office. A law to that effect was in his time actually passed, but without effect. The repugnance of the aristocracy to that measure was more enduring still than

¹ Appeals in criminal prosecutions it was soon found necessary to allow to be taken directly from the County Courts to the King's Courts.

the organisation of a Central Court; and, as to the *province judgeships*, that repugnance did last as long as the power of the aristocracy. As to the *county judgeships*, however, the aristocracy, which did not longer covet them, did soon enough admit, and even urge, the obligation of the incumbents in person to attend to the duties of the office; but here the resistance was persevered in by the poorer nobility, since by a royal grant of 1569, those judgeships were reserved to the nobility, some few excepted, which were to be given to the king's courtiers. Even that resistance did, however, cease, when the nobility perceived that the offices were no longer theirs, and would hardly be theirs again, as they had been before. The loss was effected in consequence of the institution of the King's Courts, and of the want of means for their salaries. The Government found those means in the salaries of the county judges, since the words in the grant of 1569 were a little changed by later grants. The officers of the King's Courts were appointed county judges also, received the salaries, and left the duties to be attended to by deputies, as before. And then, since the conservation of the old fashion did not bring profit to the nobility, it began to lend an attentive ear to the complaints of the county judges' absenteeism, and to complain louder than any body, although the duties of the offices were then better attended to than before, since judges and higher judicial officers were responsible therefore, and the deputies encouraged by hope of promotion in the King's Courts. Sometimes, however, that change in the sentiment of the nobility was hard to perceive. It was as long as they did not perceive alarming signs of the downfall of their order. When, therefore, the Government did, in the year 1649, after the thirty years' war was at an end, declare its opinion to be, that county judges should be appointed, who should attend in person to the duties of the office, and when that opinion was supported by the inferior estates, it was coldly received by the nobility. That estate concurred certainly in the Government's wish for other appropriations to the King's Courts; but it did so, because it wanted to recover to itself

the county judges' salaries. The Government, on the contrary, wanted efficient county judges, noble or not noble.

" In the year 1655, however, the nobility met with a defeat, which showed plainly enough that the good old time was drawing to a close, when the county judges' salaries were to be had by the nobility, without attending to the duties; and the effect on the sentiment of the nobility was plainly to be seen in the year 1660. The hope of unconditionally recovering what was lost was very reluctantly given up; and the chief complaint was even then that the county judgeships were given to men who were not noble, and, particularly, that they were conferred on officers in the King's Courts. But the nobility had nevertheless made up their mind to bid fair for the coveted offices. The obligation of county judge to attend in person to the duties of the office was acknowledged, and the opinion expressed that the obligation ought to be enforced. That concession is certainly worthy of remark, even if there were some hope retained of ridding themselves of the obligation, when the salaries were once fairly out of the grasp of the King's Courts, because that hope was certainly not without misgivings, which proved but too true. The exclusion of the King's Courts from the enjoyment of the county judges' salaries was clearly not easily to be accomplished, as long as the aristocracy squandered away the public money. Repeated efforts were therefore necessary at the subsequent legislative sessions for twenty years more, and must every time be supported by affirmations of the necessity of the county judges attending in person to the duties of the office, until the nobles themselves were as convinced of that necessity as the inferior estates and the King. To the claims of the nobility to be exclusively appointed county judges no attention was paid.

In the year 1680 the question was moved for the last time. The occasion for it was then removed by the enactment, that no county judgeships should be held together with another office, and that every county judge ought to reside within his district, and attend to the judicial duties in person, whenever he was not legally excused. The officers of the King's

Courts were otherwise provided for, in consequence of the financial reform effected at the same time.

And all those enactments were at the same time extended to the province judges. The opinion that they also ought to attend in person to their judicial duties in the province had certainly been long since expressed, although without effect; but the opinion that a province judgeship ought not to be held together with any other office had not been expressed before the year 1680, and would before that time hardly have been thought of by the nobility, or with any hope of success expressed by any body. It implied, namely, that the senators should cease to keep the province judgeships, which were held by them ever since the fourteenth century. That demand would have been thought to be a piece of unparalleled impudence, as long as the senate enjoyed the former consideration. But that consideration was just then broken, and so their claim of the province judgeships could also be successfully called in question; and it was, in fact, by the poorer nobility, who then worked hard to avenge real or imaginary wrongs upon the senate. Two years before it had been enacted, that county judges' deputies should be approved by the King's Court¹, and, twelve years before, that the King's Court ought to appoint the province judges' deputies.

And by those enactments, which did all of them take effect, together with the previous organisation of the King's Courts, the judiciary in Sweden was restored to the dignity and efficiency which had been lost by civil strife and aristocratic influence. The City Courts had lost less of their efficiency than the other, and did not want any such reform as they.

The provinces and the counties had certainly lost, and did not recover, the right of nominating their judges; but that right was then little thought of, provided the king did appoint "good men and true," and it is still little thought of. The City Courts had lost their self-completing power; but the inhabitants of the cities had acquired the right to nominate some, and to elect more, of their judges.

¹ Now every deputy of a county judge is appointed by the King's Court.

“ The slowness of the reform of the Inferior Courts was certainly reprehensible, but the wisdom of commencing reform of the judiciary by the organisation of the King's Courts was fully shown by experience. It would have been impossible in the early part of the seventeenth century to find able men for all the Inferior Courts of the country. It was comparatively easy to find such men for the King's Courts, who were to influence the inferior; and for increasing the efficiency of the County Courts there was, at the commencement of the Reform, next to the organisation of the King's Courts, no better method than to make the office of county judges also, responsible for their deputies, in whose election and thorough training they became deeply interested. In fact there was, in the seventeenth century, after the year 1614, a rapid and constant increase of the ability and efficiency of all our Courts of Justice; and the vigour of the law was, under the active superintendence of the King's Courts, restored faster than had perhaps been expected.

“ Considering the antiquity of the Codes, the state of the country, and the changes of that state since the Codes were promulgated, it is, however, manifest that their rigour could not be restored without hard work in establishing the true sense of many obscure enactments, and in adapting to the time then being of what suited better with the fourteenth than with the seventeenth century; in a word, that the re-creation of the *Common Law* was necessary, since none such had been thought of in the time passed after the promulgation of the common codes in the fourteenth century. This work was mainly done by the King's Courts, who now in this regard were to perform what the province judges of the fourteenth century were bound to do. And such was the success wherever they did their duty, by precedents of their own, or by advice given by the senate, that, within the same century, when the task was commenced, what had been done was deemed sufficient, a further aggrandisement of the new Common Law was thought unnecessary, and the Courts of Justice were bound by the Statute Law alone, and the Common Law already established.

“ And long before that time enough had been done for s

a diffusion of legal knowledge as was requisite for the framing and passing of a new Civil and Penal Code in the modern language, as was demanded by the national repugnance to a Common Law, the national claim of the possibility for every man to act as his own attorney.

“Obliged, however, to wait for such a work until it would please the ruling men to set seriously about it, the hope ultimately to obtain it strengthened itself by the comparative activity and perseverance, and the ultimate success in the remodelling of the less intricate parts of the law, since the fears of the clergy and the aristocracy were calmed. And the turn of the civil and penal law came, in fact, at last. How each of those new codes, or parts of what was once a single code, the ecclesiastical, the political, and the civil and penal, was framed, passed, and approved, what are the principal changes it has since then undergone, and what are its prospects in the next time, will now be my duty to tell.

“The *Ecclesiastical Code* was first remodelled. How that part of the old codes was left out of the Code of Magnus Ericksson you know already. It was left out also when that code was amended in the year 1442; and our fathers helped themselves along with the ecclesiastical parts of the old Province Codes. Among those the Uplandia seems to have been most exclusively used. But the Reformation destroyed the authority of many of their enactments. Already before 1530 many were expressly declared void, and several statutes substituted, and in the year 1571 an ordinance was promulgated, in order to pave the way to more positive enactments, to be given when the public opinion was better prepared for them. Charles IX. did, in the year 1609, submit to the Legislature a complete Ecclesiastical Code, but it was not acted upon. The clergy did not agree better with the liberal views of Charles than the aristocracy did.

“In the subsequent part of the seventeenth century, however, the want of an Ecclesiastical Code, adapted to the time then being, was intensely felt. The people and the government thought that the consequences of the Reformation were not yet acknowledged, and the clergy wished firmly to establish their own independence. Gustávus Adolphus, or

his counsellor, Axel Oxenstjerna, wished to proceed in this matter as had been done in order to pave the way for the reforms of the civil and penal law, and thought the organisation of a supreme ecclesiastical council a needful preliminary to the remodelling of the Ecclesiastical Code. Such an organisation was therefore recommended in the year 1624. The clergy were, however, adverse to it, because laymen were to be members, as well as clergymen; and their opposition was more obstinate than that of the aristocracy to the organisation of the King's Courts had been. Although the Government attempted to get the plan through as late as 1649, it was obliged finally to yield, and directly to proceed to the framing of the Ecclesiastical Code. The bishops were, in consequence, ordered, each of them, to report that code as he would have it, and in the year 1650 law and clerical commissioners were appointed to forward the matter. They occupied themselves mainly in sifting two reports, the one framed by a bishop, the other by a professor of divinity, who had volunteered his services. The commissioners were in great numbers, did slow progress, and were soon discharged, at the instance, I presume, of their chairman, the illustrious *Axel Oxenstjerna*. In the year 1655 other commissioners were appointed, all of them clergymen. They did not agree upon the question how far the language ought to be modernised or left as it was in the ordinance of 1571. Two of them submitted each his own report in the year 1659. Those reports were not *then* acted upon. In the years 1664 and 1668 the revision of the Ecclesiastical Code was again spoken of; but the nobility and the clergy did not agree. The nobility demanded that not clergymen alone, but laymen also, should frame the report. The clergy did not think fit that any laymen should be commissioners. The matter was consequently postponed, and no progress was made before the year 1682, when the king ordered the representatives of the clergy in the Legislature to report an Ecclesiastical Code. The circumstances did not allow that order to be slighted; and the clergy seems, besides, to have been then favourable to the matter. They examined the reports of 1659, and framed a new one. That was within

the same year sifted by members of the senate and of the legislature, and in the year 1684 eight laymen were appointed further to report on the Ecclesiastical Code. Having, by the permission of the king, cast off what savoured too much of hierarchy, they submitted their report in the year 1685. They were then reinforced by some clergymen who, however, did alone frame the final report. That was submitted to the king in the year 1686, and, within the same year, approved by him and by the legislature. Nominally that code is still the law of the land, but in fact a very small part of it is now in force. The others are abrogated by the common Civil and Penal Code, and by several statutes; and by statutes many matters also are regulated which were on purpose omitted or superficially treated in the code. Three new ecclesiastical codes are since the year 1686 reported, namely, in the years 1731, 1828, and 1846, but none of them is acted upon. The clergy are not favourable to reform. The people do not care much for the ecclesiastical law now. We have an established church, and few think as yet of a complete separation of the church from the state, and of a perfect equality of all churches. The tolerance is also narrow-minded.

“ The next code remodelled was the *Constitution*. Already in the year 1609 a revised constitution was submitted to the legislature by Charles IX., but it was not acted upon any more than the revised Ecclesiastical Code. In the year 1617 Gustavus Adolphus gave some regulations for the legislature; and in the year 1634 a constitution was passed, chiefly for the government of the country during the minority of the king. The attempts to have it approved by a king of age miscarried. Amended in the year 1660, it was declared void in the year 1680; and it was not before the years 1719 and 1720 that the constitution of the fourteenth century was finally superseded by a new one, binding also upon a king of age. In the year 1723 new regulations for the legislature were passed. That legislature being found incompetent for their task in consequence of its composition, Gustavus III. availed himself of the general discontent, and recovered nearly all the power lost by the royalty in the years 1719

and 1720. The new constitution was passed in the year 1772, and the royal power was further enlarged in 1789. The son of Gustavus was dethroned in 1809, and a new constitution passed. The regulations for the legislature were passed in 1810.

“ It is worthy of remark, that in 1772 the question was not at all mooted how many faults of the legislature were to be imputed to its composition. The king would have it believed that the cause of the evil was the excessive power of the legislature; and he succeeded in giving that idea currency. In the year 1809 many influential men were aware that the late disasters of Sweden were indirectly caused by the organisation of the legislature, and recommended a better organisation; but too many of the privileged classes did then, and do still, hope that all is to be well, since the legislature has recovered what, in their opinion, is a just share of the power. At present, and since 1840, however, the amendment of the constitution most agitated is a reorganisation of the legislature. That body, composed of four estates, — nobility, clergy, representatives of the cities, and farmers, — is, by a great part of the people, considered as quite incompetent to their duties; by others, on the contrary, as an excellent bulwark against demagogism and revolutions. There are also good people who do not think very highly of the legislature as it is, but wish the reform to be made on the principle that the representatives shall be elected by certain classes only, each of whom is to send a fixed part of the whole. For the moment there is hardly more hope of an immediate solution of that question than there is in the United States of a speedy solution of the question of slavery. Both will, however, be solved; and we can hope for a solution of the Swedish question, when reaction loses its present hold of Europe. The chief merits of the Swedish constitution which is, since 1809, many times amended, are: complete safety of life, liberty, and property warranted; liberty of the press; exclusive vestment in the legislature of the power to grant taxes and make appropriations of the public money; and, lastly, the publicity of the financial concerns.

“ Lastly, but not least, was the revision of the *Civil and*

Penal Code, and the thorough remodelling of it. The other parts of our ancient codes *could* be remodelled without any previous reorganisation of the judiciary, although they were it not. The remodelling of the Civil and Penal Code would, from reasons already told, hardly have been worth while to attempt, before there were some courts of the same standing as the province judges of old, — as conversant as they with the principles of Swedish law and of general justice; and the attempts, which led to a result, did not, in fact, commence before the reform of the whole judiciary was accomplished. For the result itself Sweden was obliged to wait half a century more.

“The ardent mind of Charles IX., which never yielded to any obstacle without trying to overcome it, could, however, not be satisfied without an attempt to have the whole Country Code remodelled at the very time when the reform of the judiciary was as yet to be commenced.

“He recommended such a remodelling in the year 1593, 1602, and 1604, and he tried his own hand at the work in the years 1603 and 1608. Two reports on the subject were prepared in the year 1609. The one, not complete, contains a true exposition of the king's opinions, in favour of the people and of the king, but not of the aristocracy; the other is complete, favourable to the aristocracy. This last report was never, neither whole nor in part, submitted to the Legislature; and of the king's report nothing, concerning the Civil and Penal Code, was submitted, since the Legislature declined acting upon the Ecclesiastical Code and the Political Constitution, which were submitted in 1609. Charles gave them up the whole thing, and neither he nor Gustavus Adolphus made another attempt of that kind. The attempt made was a long time mentioned by the adversaries of legal reform as an excuse for their repugnance to every more comprehensive Law Reform.

“In the year 1640, twenty-six years after the organisation of the first King's Court, and six only after the third was organised, the Government felt, however, the necessity of legislative action, in order to determine some principles which were thought too important to be left to judicial discretion.

Commissioners were appointed to report on them; but the report was not acted upon. The Government thought, perhaps, that the remedies pointed out would bear too heavily upon the feelings of powerful men, and ought to be postponed until the country was fairly out of the dangerous which then raging. The evils were, however, too great to be borne so long a time without some further effort for relief. In the year 1642, on the 4th November, nineteen commissioners among whom were three jurists of the highest standing, — *Stjernhook*, *Stjernhjelm*, and *Berling*, — were again appointed. Their report bears the date of the 17th March, 1643. The report, although it did not meet with a full approbation from the Government, seems, at least, to have convinced the leading men that some action ought to be taken on the subject. It was found expedient to appoint a less number of commissioners to report the amendments of the Code which were most needed, particularly amendments of the procedure.

“ Those commissioners, four in number, among whom also were *Stjernhook* and *Stjernhjelm*, reported on the 6th August in the same year, a *Code of Civil Procedure in the Province and County Courts*, a *Code of Civil Procedure in the City Courts*, a *Code of Occasional Procedure*, and a *Penal Code*. The first, third, and fourth of these reports are chiefly the work of *Stjernhook*, and worthy of the celebrated author of the book, *De Jure Sveonum et Gothorum vetusto*. The main fault was too great a predilection for some antiquated enactments of the Ancient Code. The Code of Civil Procedure in the City Courts was the work of another commissioner.

“ But here the activity of the Government for a more comprehensive Law Reform ceased for the time then being. The reports were laid aside, and more than twenty years passed before commissioners were again appointed for amendments of the Code.¹ The only advantage the people reaped from the commissioners' labours in the year 1643 was some reform of the penal law, through an ordinance in the

¹ *Stjernhjelm* was, however, about the year 1657 occupied by some such labour.

year 1653, chiefly on the punishment for stealing and for adultery.

“ With that exception, the Government, in the next time after the year 1643, cared more about throwing the responsibility of Law Reform on the Legislature than about exerting itself for its promotion. When, therefore, the Legislature met in the year 1649, the Government declared its opinion to be, that the Codes wanted some legislative action in order to be adapted to the present state of the country, and asked the advice of the Legislature how the thing ought to be done. Three of the four estates admitted the fact, as stated by the Government, and two of them also pointed to the low amount of the fines as particularly injurious. One gave it as its opinion that the Codes ought to be left as they were, but the needful amendments added as *novellæ*. The answer of the whole Legislature was, that whenever a good explanation of the Codes, and one adapted to the present circumstances of the country was submitted to the Legislature, it would be thankfully received and readily passed, *if it were just and equitable*. That answer was, of course, not what the Government wanted. They had asked for advice how the work was to be done from the first. They wished to know if the Legislature would have the report framed by delegates of its own, or by commissioners appointed by the Government, and so forth, and how far the reform ought to be carried in order to be acceptable to the Legislature. Now the Government, uncertain what to do, as the Legislature declined taking the responsibility upon itself, asked the King's Courts for advice, in order to be able thus to share the responsibility. Their answers are not to be found; and led to nothing, if not to the promulgation of the penal ordinance in the year 1653.

“ In the next year, 1654, the illustrious *Axel Oxenstjerna* died, and then it seems as if the Government had given up the question of a comprehensive Law Reform altogether, exactly as Charles IX. did, in the year 1609. The next time the question was moved after 1649, it was done by the Legislature itself. That was in the year 1669. There were in that year two legislative sessions. At the first the

representatives of the cities, and at the second the whole Legislature, did ask for amendments of the Codes. But the Government was now, in fact, as indifferent to the reform as the Legislature had seemed to be in the year 1649. The Government did not act upon the advice; and it was therefore repeated in the year 1664. The Government¹, or rather the first of its members, the Minister of Justice, *Brahe*, in many respects an excellent man and very active in advancing the efficiency of the Courts, but adverse to a comprehensive Law Reform, was troubled at the first mention of the thing in the Legislature. He reminded his colleagues of the abortive attempt in the year 1609, and asked the advice of the King's Courts, who also declared themselves adverse to every attempt of remodelling the Codes; and by these means and the influence of the Government, the Legislature was prevailed upon to give the demand a turn, as if the question were, not of a reform of the Codes, but merely of some statutes.

“ Such statutes were also, in fact, promulgated in the years 1664—69; and besides, commissioners were appointed the 27th March, 1665, who reported, the 20th of December, a *Penal Code* and a *Statute for amending the Procedure*, and also gave their opinion on several questions made by the Minister of Justice. *Stjernhook* was one of the subscribers of the first report, which is chiefly a copy of the Penal Code reported in the year 1643; and he and *Berling* subscribed the second, as also the opinion on the Minister's questions.

“ By appointing these commissioners, and by the statutes promulgated before the year 1668, when the Legislature met again the Government had accomplished what the Legislature had expressly demanded in the year 1664; but it seems as if that Government had been conscious that the Legislature had then been prevented from telling all that it wished; and it was therefore, I think, found expedient to have something more than was expressly demanded, to show to the Legislature. Within three months since the commissioners appointed in 1665 had submitted their reports, one of them,

¹ The King was not of age.

Stjernhook, was charged with the task of introducing the Country and City Codes into the new Code. This distinguished jurist seems, however, to have regarded this as a mechanical task. He wished to leave out of the Codes all antiquated laws, and to put all recent ones in force, and also to arrange the laws in a more suitable manner. We do not know how the Government gave, nor how far *Stjernhook* was able to perform the task imposed upon him in the year 1664.

"As the time drew near when the new Code should commence in the year 1664, *Stjernhook* was very active in preparing the message which regarded Law Reform. The Government insisted that the Code should suspend the amendment of the laws of age. That was to be in the year 1664, and as the next legislative session was to be held at that time, the Government's intention of Law Reform, not only for the next session also. The new Code of Law Reform ought to be effected in the year 1664, and originated in the King's Commission in 1664.

"The Legislature, in 1664, was so far, that as definitive acts were to be submitted, ought to be submitted, but they thought fit that the amendments and necessary, should be reported in a manner of their embodying the Legislature reserved to its discretion.

"*Stjernhook* and *Berling*, on the advice, appointed commission, on the 27th March, 1669; and, they were requested to prepare the next legislative session, could, however, not be submitted to the

ready was, nevertheless, communicated to a committee, and the matter was spoken of in that committee and also in others, and the opinion pronounced, although not unanimously, that the Codes ought to be translated into the modern language. The opposition came from some lovers of antiquities, who thought the ancient Codes excellent to learn the ancient language from. These gentlemen either did not care whether the people understood the Law or not, or fondly hoped that the people at large would unlearn the modern language, and learn the ancient. Of course it was called to their mind that the original Codes would not be lost for gentlemen who had a mind to study the ancient language, although a translation was made for the common people. The antiquaries were not satisfied by that.

“ The next legislative session was in the year 1675. *Stjernhook* was then dead, and, from the message of the Government, it seems that the report was not yet complete. To review what was prepared some members of the Legislature were chosen; but the war in which Sweden was at that time engaged prevented any immediate progress of Law Reform, and in the legislative sessions 1678, 1680, and 1682, little or no attention was paid to that subject.

“ At the legislative session in 1686, however, there was a great change. Although the nobility generally had been foremost in demanding Law Reform, the aristocracy proper had listened to these demands with the utmost diffidence. But the power of that aristocracy was broken in the years 1680 and 1682. New men had the greatest influence, and one of these who, in the year 1686, was chairman of the house of nobility, called their attention to the want of a revision of the Codes; and that opinion then hardly met with any opposition.

“ The advocates of slow reforms, who admire the tactics of *Brahe* in the years 1660—1680, have been puzzled for an explanation of this sudden change of opinion. They advert triumphantly to the fact that the inferior estates in those years were cautious in expressing their opinion as to the extent of the Law Reform, and they think that the change must have been brought about by the influence of the King

only, and that his motive was the wish to rid himself of the old liberal constitution.

“ I cannot be of that opinion. It is very probable that the King was friendly to the recommendation made by one of his most intimate friends; but it is hardly probable that this friendly disposition was caused by the wish to get rid of the old constitution. The *political* rights of the lower classes as guaranteed by that constitution, were nearly all of them for centuries trampled upon, and any further encroachment upon them was certainly not contemplated, as it was not attempted, by the King. In the years 1680 and 1682 the King had also, notwithstanding that constitution, crushed the aristocracy, and got his power as enlarged as his utmost wishes would go; and his son, Charles XII., did, under the same constitution, twenty years exercise a power as unlimited as any Swedish king has ever wielded. The abolition of the old constitution was certainly not wanted in order to enlarge the King's power. The liberality of the old constitution was more to be feared by the aristocracy, who had been adverse to the revision of the Codes, than by the King, who was friendly to that revision.

“ We come nearer the mark, I think, in the supposition that the want of the revision was so readily admitted in 1686, and the old cavilling about the extent and bearing thereof so readily forgotten, *because* the aristocracy, who had before acted under the impression that they could not but lose by a reform in which deeply-injured classes participated, had then lost nearly all that they had feared to lose, and consequently did not think it worth while to delay the reform any longer; *because* the other classes did not now fear to be overreached by the aristocracy, and *because* the new men wished also in this respect to mark a new era, and to acquire to them and their patron the honour of giving to Sweden a New Code, intelligible to all, as far as could be, and adapted to the present state of the country.

“ Be this as it may, the commissioners for the revision of the Country and City Codes were appointed before the end of the year 1686. But all of them were public officers, and none of them were exempt from attending to the ordinary

duties of their offices. The work, therefore, progressed slowly, even as it was commenced at least forty years later than it ought.

“ The first thing upon which the commissioners agreed was to report *one* Common Code for the country and the cities. The old difference between the country and the cities, in the laws of succession to the property of deceased persons, and of the communion of property between husband and wife, was maintained, and embodied in the Common Code.

“ Between 1686 and 1710 only *five* parts out of the *nine*, of which the Common, Civil, and Penal Code is now composed, were framed by the commissioners, reviewed by the judges of the country, submitted to the King, and then amended by the commissioners. In the years 1712—1714 those parts, and also a *sixth* and a *seventh* part, which were framed in 1712, were amended by the most illustrious of Swedish jurists then living — *Charles Lundius*; and on the 16th of May, 1717, the commissioners reported *eight* parts of the nine. The ninth part was reported in the year 1723; and the commissioners notified at the same time that the style of the whole was in the years 1717—1723 amended by their chairman, *Covalijelur*.

“ In the year 1723 there was a legislative session; but the leading men were not favourable to immediate action upon the reported Code. As an excuse for deferring the matter to another session, it was remarked that several statutes were recently passed whose enactments ought to be embodied in the Code before they were acted upon. The Legislature did, in fact, order that those enactments should be embodied in the Code before any action on it could be taken. The next session of the Legislature was in the years 1726—1727. Three parts of the Code were then reported with the additions and amendments demanded, but were not acted upon, because the whole was not reported.

“ These delays may, as the delays in the years 1660—1680, surprise a stranger who is not conversant with the history of the Swedish Legislature. A Swede, conversant with that history, cannot be at a loss for explanation of this manifest unwillingness to set about the work,

“ The aristocracy, broken down in 1680 and 1682, and reinstated in the year 1719, in nearly the same manner as the French aristocracy was in 1814; that is to say, reinstated in the ancient dignity, without the ancient means of supporting it, and without the ancient power, was at first adverse to every thing emanating from the government of 1680—1718, which was not a *fait accompli* beyond the reach of their power. Of course they also hated the New Code, originated and nearly matured during that time.

“ But the want of a New Code was too evident to be denied; and so the aristocracy was ultimately obliged to sacrifice its dislike. In the legislative sessions in the years 1731 and 1734, the New Code was passed with very little debate. On the 1st of September, 1736, it became the law of the land. And all were satisfied by it. Although it originated in a time when the aristocracy was deeply fallen, that class found in it all the advantages it could reasonably hope for. The people liked it because it was easy to understand, and because it gave the people what they then expected. The style, now a days an object of a kind of superstitious reverence, is indeed excellent, far above that of the Code of 1442, which the aristocracy, in 1672, asserted could not be equalled. No wonder, then, that the New Code was a long time left just as it had been promulgated. It was not until some forty years afterwards that more essential amendments were made. A great number were passed in the year 1779. After that year twenty-one years more were allowed to pass without memorable amendments, with exception of some few of rather a political tendency, passed in the year 1789. But in the year 1800 a new series of important amendments commenced; and they have been especially frequent since the revolution in 1809.

“ The chief object of amendments has been the Civil part. But in 1779 and 1841 many amendments of the Penal part were passed in order to make it more accordant with the spirit of the age¹; and also in the years 1823, 1835, and 1845, amendments have been passed to mitigate the punish-

¹ The use of torture, unknown to the Code, was prohibited in the year 1772.

ments. In the year of 1807 many penal enactments were also amended; but these amendments were rather of a formal character.

“ The period since the revolution in 1809 deserves, as far as the Civil and Penal Code is concerned, a more particular attention in the history of Swedish Law Reform, not only by the number and importance of the particular amendments of that Code, but also by the revision of the whole Code, which has been accomplished, although the reported Code is not yet passed and approved, and although it is probable that it will not be done very shortly. Of that revision I must therefore now speak.

“ In the legislative session 1809—1810, when the present Constitution was passed, several motions were made for a revision of the Civil and Penal Code. Three topics were distinctly insisted upon. *The first* was the want of a broad *line of demarcation* between the Law which did properly belong to the Civil and Penal Code, and what is in Sweden called *the Law for the general economy of the country*, and somewhat resembles what in France bears the name *droit administratif*. That line of demarcation was thought important, since the framers of the Constitution had again adopted an old German principle, approved of in Sweden in the year 1682, but banished in the year 1719, that the power of making laws for the *general economy of the country* was a part of the prerogative of the Crown, from participation in which the Legislature was excluded unless the King asked its concurrence. *The second* of those topics was the *simplifying*, and the third, the *amending* of the Code.

“ The committee reported favourably on those motions in April 1810, and thought it expedient, that commissioners should be appointed to classify, to simplify, and to amend the enactments of the Civil and Penal Code; and the Legislature resolved on the 1st of May the same year, that commissioners should be appointed for simplifying and amending¹ the Code, and reporting to the King and the Legislature at the session which was to commence the 1st of September,

¹ Classification was not then mentioned.

1815.¹ The King appointed the commissioners, and defined at the same time their duties more explicitly. They were to report a Civil and Penal Code, divided in parts which should bear the same names as those of the old Code. It was besides prescribed, that the report should be printed, and public officers were ordered, but other citizens, who had experience in those matters, were invited, to communicate to the commissioners their objections.

“The commissioners went to work ; but it did not advance as fast as the Legislature had fondly hoped. The principal cause of delay was the great number of the commissioners, of whom some few only were to frame the report, and the others were only to sift it. That cause operated, however, only on the framing of the Civil Code. When experience had shown, how much time was lost in talking about the matter, since the reports on the several parts of that Code were drafted, that inconvenience was made an end of, for the work which remained to be done. It was declared, that the examining commissioners should state their objections to the Penal Code in the sessions where it was drafted, and that no other sessions for debating on their objections was to be held.

“The reports on the Civil Code Proper were printed in the years 1815, 1818, and 1819. The report on Civil Procedure was printed in 1822. The Legislature met after the work was so far advanced, in 1823. It expressed the wish to have the whole Code, Civil and Penal, submitted (with the enactments on procedure) at its next session in the year 1828. The commissioners, however, thought a revision of the reports already printed of great necessity, on account, not only of the objections communicated, but also of several statistics subsequently passed, whose enactments ought to be embodied in the Code ; and the King allowed them immediately to set about that revision, and meanwhile to postpone

¹ In Norway it was enacted by a section of the Constitution, in 1814, that a new Civil and Penal Code should be reported in the year 1815 and 1818. The Civil Code is not yet reported. The Penal Code, first framed by a joint Norwegian and Swedish committee, was passed in Norway in the year 1842. That committee framed also the Report on the Swedish Penal Code.

the report on the Penal Code. The Civil Code, comprehending also the enactments on Civil Procedure, was reported complete in the year 1826. That done, the commissioners reported the Penal Code in the year 1831 without any exposition of the *motives*. That was submitted in the year 1832. After objections to that Code had been communicated, an amended report was submitted in 1833. Both reports comprehended the enactments on Criminal Procedure. The part taken by the Norwegian commissioners in the first report has been already mentioned.

“ Since the Civil Code has been reported complete, but before the report on the Penal Code was submitted to the King, there was a legislative session in 1828. The Legislature was informed by the King of the progress of the work; and it asked for a summary of the differences between the old Code and the reported one, and of the plan and principles of the last.

“ At the legislative session in 1834, the King was at liberty to recommend the passing of the Civil Code, since the Highest Court had given its opinion of it.¹ No such thing was done. The King only transmitted the report with the opinion of the Court, without expressing any opinion of his own as to the steps the Legislature ought to take. Nor was there transmitted any summary, such as the Legislature had asked for in the year 1828. Indeed nothing had been done in order to have such a summary. The Legislature declared its opinion to be, that it was not expedient to act upon the report before the Penal Code, with the opinion of the Highest Court, was also submitted. At the same time, the wish for the summary was again expressed. It was resolved, that commissioners should be appointed for drawing up that summary so early that it would be printed before the next legislative session. Those commissioners were appointed in the year 1835.

“ At the legislative session in 1840, the summary of the

¹ The Constitution directs, that whenever the King does recommend a change of the Civil, the Penal, or the Ecclesiastical Code, the opinion of the Highest Court on it shall be taken, and transmitted with the recommendation to the Legislature.

Civil Code was transmitted by the King, together with notice, that neither the summary for the Penal Code, nor the opinion of the Highest Court on that Code, was as yet come to the King's hands. The King expressed the same opinion as the Legislature had expressed in 1834, of the expediency of a simultaneous action on the Civil and Penal Code; and he declared his hope to be able at the next legislative session to recommend the action he thought fit on both the Reported Codes, the Civil and the Penal.

"In order to further the progress of the work, an opposition member of the Legislature submitted resolutions:—

"That commissioners be appointed to revise the several parts of the Reported Codes, and to report every part revised to the King;

"That, as soon as the King had examined a part, that part with the decision of the King be printed, as the King's proposal to the Legislature; and

"That both Codes, with the decisions of the King, be printed before the legislative session which was to be next after the expiration of three years from thence. The cause of the motion was some doubt of the King's favour to the reported Codes. The evident purpose was to prevail upon him to give his opinion on both the Codes before they were submitted to the Legislature, and to give it as early as could be. The enemies of Law Reform would then have less time for intrigues and there would not be any fear of a subsequent use of the King's veto power, if the Legislature passed the Codes as recommended by the King. The opposition knew, that the Minister of Justice, who held that office in the years 1810—1829, had been in favour of Law Reform, and done every thing in his power to forward it, but that his successor, who held the office in 1829—1840, was adverse to it; and although the office then came in other hands, fear existed that the power would again be given to men as unfavourable to the Reform, as the minister of 1829—1840.

"The Legislature did not go quite the length as the opposition member just spoken of, but did nevertheless resolve:—

"That commissioners should be appointed to revise the Reported Civil and Penal Code, and to report to the King every part so revised, and also the statute necessary for the

new Codes superseding the old without deranging the due course of justice ;

“ That every part so reported should be examined by the King and, *when definitively prepared*, printed ; and

“ That the whole should be printed before the next legislative session after the expiration of three years from thence, at which session the Legislature hoped to receive the King’s opinion on the matter.

“ The commissioners were appointed by the King accordingly, at first only among men who had not been active in framing the Reported Code. But in 1844 there were some new commissioners appointed, among whom was also the man who had been the most active framer of the Reported Code, and who now became the most active reviser, *John Gabriel Richert*, the most eminent among Swedish jurists now living.

“ Since that time, the several revised parts of the Code have been reported, in the years 1844, 1847, 1849, and 1850. In the present year the commission has been dissolved.

“ The Code is now three times reported ; but as yet the penal part is the only one upon which the Legislature has seriously acted. That was in the sessions 1844—1845, and 1847—1848. In each of those sessions the passing of that part with some amendments was recommended by the King. But already in 1844 there appeared a strong reluctance to it among the nobility and clergy ; and although the Legislature then passed the recommended system of punishments, that indefinite declaration, as was perfectly foreseen, did not prevent the defeat of the whole in the session 1847—1848 ; and in the last legislative session, 1850—1851, when the reaction party in the nobility and clergy was still stronger, there was hardly any mention made of the Reported Code.

“ The penal part of it is still supposed to be an object of the King’s particular favour. But in that part are also to be found the enactments which are most feared by the reaction party : the abolition of the punishment of death for several crimes, to which it is still attached by the Law ; the total abolition of whipping, of confinement on a diet of bread and water, of the pillory, and of other ineffective penalties, and

the substitution of an improved system of imprisonment; as also the discretion conferred on the Courts, as to the extent of punishment for cases for which such a power is not at present given. These points will certainly not be carried without hard fighting.

“In the civil part of the Reported Code there are, on the contrary, now hardly any enactments to be *dreaded* by any party, if we are not to consider as such, one prohibiting the creation of perpetuities in personal property (a consequence of what was done as to real property in 1810), and some few in favour of lessees, of servants, of illegitimate children, of liberty to dispose of real property by will, and of oral procedure. Nevertheless, that part is certainly as much *hated* by the reaction party as the penal; but the principal cause of this hatred is, I believe, not fear of anything that can be introduced by it, but dislike of some enactments which are already the law of the land. The reason why the civil part of the Reported Code is to be rejected for their sake is, that they were embodied in it before their being passed, and are retained in it now. Those enactments regard the division of property between husband and wife, and the succession to the property of deceased persons.”

(To be concluded in our next Number.)

ART. X. — THE ECCLESIASTICAL COURTS.

Second Report, Fees (Courts of Law and Equity, &c.) Ordered by the House of Commons to be printed, 14th August, 1850. (711 Sessions 1850-51.)

UNPOPULAR as the Ecclesiastical Courts are, and strong as are the public prepossessions against them, the Report which stands at the head of this Article will be received with sentiments of surprise and indignation throughout the country. The abuses it details will, we believe, be found far to exceed in magnitude all similar examples in other public departments, and they present features of aggravated deformity that must

excite a general feelings of perplexity and amazement at the apathy of the government and of the people which has so long permitted them to exist.

It is our intention to give a brief summary of the tenor of this Report. But previously to so doing, we deem it best to explain our views of the principles applicable to this question. Our duties are those of practical Law Reformers, and we should not be fulfilling our appropriate task were we to content ourselves with an exposition of defects and abuses. It is incumbent on us, as far as lies in our power, to indicate the remedies that will reach the root of the grievances now under discussion.

We consider the objections to the Ecclesiastical Courts to apply, not merely to their administration, but to the fundamental nature and constitution of their jurisdiction. A general concurrence of opinion has lately been established, among enlightened authorities on jurisprudence, with respect to the inexpediency of maintaining a separate Equity or Chancery jurisdiction; a proposition which has been fully discussed in the present and in other numbers of this Review. Now the principal objections which have been suggested against an independent Chancery jurisdiction may be urged with equal truth against the preservation of separate Ecclesiastical Courts.

The business of those Courts is divisible into two branches, viz. the "contentious," chiefly consisting of cases involving the trial of disputed Wills of Personalty, and their "common form" or non-contested business, chiefly derived from the functions fulfilled by those tribunals as offices for the registration of Wills and the granting of Probates.

In suits relating to disputed Wills, the evidence (as in Chancery cases) consists of written evidence to the exclusion of oral testimony; and the parties (as in Chancery cases) are exposed to enormous expenses, owing to the abuses with which the Court, abound and the distance at which, generally speaking, they are situated from their residences. For these grievances (no less than for those which the Court of Chancery inflicts) local tribunals alone can afford an efficient remedy; a proposition on which it will be needless for us to

dilate, as our various Articles on Chancery will apply *totidem verbis*.

With respect to the "non-contested" business of the Ecclesiastical Courts, as offices for the deposit of Wills and for granting Probates, it will be self-evident that those ends may be most conveniently fulfilled (especially as regards the Wills of poor persons) by means of the different County Courts offices, combined, perhaps, with a common Index in London.

These observations we have thought it necessary to make in connection with this Report, because there are some cases in which an exposure of the more salient features of public abuses may have a tendency to divert the attention of the community from its primary sources, unless those sources be at the same time plainly indicated. We may here remark, therefore, that we consider it certain, that the extinction of all the sinecures, and the reduction of the Court fees of the Ecclesiastical Courts, would not suffice to render those Courts cheap and accessible to the suitor, because he would be still exposed to the heavy charges of proctors and attorneys, from which it must be impossible to exempt him except by local Courts and offices near his own home, in which he could act for himself.

We have been assured by a Judge of the County Courts, that there is no greater grievance than the difficulty and expense which are at present imposed on the humbler classes of society in obtaining Probates and Letters of Administration. Poor widows (according to our informant) are in this manner frequently robbed of the small unpaid earnings of their husbands, at a time when they may form their chief or only resource. Without Probates or Letters of Administration, they cannot sue in the County Courts, while the expense of taking them out would commonly swallow up the outstanding debts.

No difference of opinion can, we believe, exist among impartial men as to the necessity of remedying the abuses to which the Ecclesiastical Courts give rise. Hitherto the gentlemen interested in those abuses have nevertheless succeeded in thwarting the government, controlling the legislature, and setting public opinion at defiance. But their success has obviously been attributable, not to their own in-

herent strength, but to the apathy of the constituencies on the subject of Law Reform—an apathy that happily has ceased to exist. The establishment of the County Courts, which have practically taught the electors the feasibility and the advantages of a cheap administration of the Law (combined with the reiterated debates that have lately occurred in both Houses on various measures for the improvement of our legal system), have given a new impetus to the cause of Law Reform. No doubt, therefore, exists, that when the state of the Ecclesiastical Courts shall be brought forward in the next session of Parliament (as we understand is intended), the question will be discussed under circumstances highly favourable to the success of the advocates of a complete correction of their abuses. We shall now proceed to place succinctly before our readers a few of the facts disclosed by this Report.

Of the “common form” business of the kingdom, two-fifths passes through the Prerogative Court of Canterbury. The fees for the year ending March 31, 1848, amounted to no less than 30,832*l.*, out of which sum the Judge received 3,923*l.*, the Registrar 8,508*l.*, the Deputy Registrars 2,803*l.*, and the rest was applied to the general expenses of the office. A sum of 6,760*l.* was received in the same year by certain offices as discount on Stamps, a source of emolument that has since been put an end to.

The office of Registrar, which is in the gift of the Archbishop, is a sinecure. So completely is this the case, that it has been the practice to grant it, like landed property, for three lives. “The late Archbishop, when one of these dropped, did not exercise the power he had of inserting a fresh one; but the office now is full for three lives, the present Archbishop having added another to the two existing lives.” *Report*, p. 4.

Besides the Deputy Registrars, there are subordinate officers, called Clerks of Seals, who do not perform their duties in person, though expressly required to do so by Act of Parliament. An attempt has lately been made to obtain power to impose fresh fees for payment of the Clerks who actually do the work, which was refused by the authorities.

In the Chester Ecclesiastical Court, the gross fees on an

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average of the last three years, were 9,181*l.*, from which the Chancellor received a net income of 1,652*l.*, the Registrar one of 4,523*l.* (together with 250*l.* commission, for money advanced by him for stamps). No table of fees is in existence.

At Rochester, the Deputy Registrar executes the whole duties of the Registrar's office, which is held jointly by two clergymen, who are paid two-thirds of the gross receipts of the office, the deputy defraying the cost of the office out of his third. Our space will not permit us to multiply examples of these abuses, which have been carried to such an extent that in one instance the office of Registrar has been given to and is held by a female. (See Evidence, page 91.)

The greatest and most enlightened authorities on Jurisprudence, from Jeremy Bentham to Lord Langdale, have concurred in condemning the practice of levying fees upon suitors, even when the amount imposed is wholly employed in the necessary expenses of Courts of Justice. What, then, are we to think of the exaction of such fees for the purpose of maintaining a most odious system of sinecures? If sinecures are to be tolerated at all, it would be far better that they should be openly extracted from the revenues of the state than that they should be wrung from individuals under the pretence of justice.

We earnestly commend to every friend of Law Reform the perusal, both of the Report, and the entire body of evidence by which it is accompanied, and we cannot doubt the conclusion at which he will arrive.

ART. XI.—THE APPELLATE JURISDICTION.

It was once observed by Lord Denman, that we ought most resolutely to oppose the hankering of Judges after an increase of judicial force when their Courts get into arrear: he said, "If you once let them feel that this remedy will be applied, the evil will be sure to exist and call for its application." — We entirely subscribe to this sound opinion. Nevertheless, we must admit that the vast augmentation of judicial power in the

Court of Chancery during the last ten years, was recommended by the fact of an urgent pressure which had been increasing from the altered circumstances of the country ; and we have in a former Number expressed an opinion even in favour of the last addition to the number of Judges. Before proceeding further, we may stop to note in what proportion the judicial force has been increased. After the creation of a Vice-Chancellor in 1813,—which, considering the interruptions to the Chancellor's judicial by his political functions, and considering also the limited number of hours given to the sittings at the Rolls, might be said nearly, if not quite, to double the former judicial force,—there were two Vice-Chancellors added in 1841, which was again an increase twofold, or fourfold compared with 1813. Then came the late addition of two Vice-Chancellors, or fifty per cent. as compared with 1841, and sixfold as compared with 1813. There may be perfectly good reason for so enormous an addition ; it is, however, extremely probable that it may be found not permanently requisite, unless the whole system of the Court be materially changed.

That a considerable increase in the business of the Court had taken place there can be no doubt. The nature of the business had undergone an alteration, and an alteration which made greater demands upon the time of the Judges. Yet one fact is incontestable ; until Lord Cottenham fell ill, there was little or no arrear. Another fact is equally undisputed ; the arrear has been greatly increased since he retired ; and that in a very much greater degree than can be accounted for by the temporary illness of two of the Judges. Some have said that it would have been more satisfactory if the addition of two Vice-Chancellors had been postponed until the experiment was tried how far Lord Truro, with two able Vice-Chancellors and a Master of the Rolls determined to exert himself strenuously, could have kept the arrears from increasing. We are not of this opinion ; because, even if he had so succeeded, there would still have been the original amount of arrear ; and also because we think there was no reason whatever to believe that he could have even prevented its further increase. Yet, with all respect for that very able and most hard-working individual, whom it would be impossible to praise

too much for unsparing sacrifice of himself in discharging his duties, we are bound to admit his being unequal to the task of getting through business; and the interests of the suitor absolutely required that provision should be made for giving them a reasonable chance of having their causes tried. Nor ought we to consider the price as too high which has been paid, for at once retaining the valuable services of the Judge and giving the parties a prospect of obtaining his decision.

There is, however one other price which it seems there will be a risk of being called to pay for the same benefits. The judgments in the Court of Chancery are greatly in arrear,—in an arrear out of all proportion to that of causes unheard. We have already, in our account of Lord Cottenham's second Chancellorship, dwelt on the great evils of the course too often of late pursued by him—by his successors still more. But in one department of his office, the evil is greater still than in Chancery; in the House of Lords, though the Session has been of the full average length, and the number of days devoted to judicial business above the average, we believe there is no instance of so few causes being disposed of; and it is said that not one Scotch Appeal has been decided. Some accounts say only one; others not one: we care not which statement is correct: the parties whose appeals have been fully heard must wait till next year before they can have the decisions to which they were entitled, some of them before Easter, others before August. Accordingly it is vain to deny that great discontent prevails in Scotland, and the consequence is the agitation of projects for changing the appellate judicature.

We consider that there is much risk of some rash step being taken on this very important question—a question important both to the Scotch judicial system and to the constitutional functions of the House of Lords. The English Law advisers of the Crown are, in a degree never before known under any other Ministry, unacquainted with every thing relating to this subject; and a person might be most strongly inclined to commend certain leading members of the present Ministry without being able to affirm that they were incapable of acting in a headlong, unreflecting manner, upon matters of great delicacy as well as grave importance. Our

countrymen North of the Tweed, too, seem well disposed to hail measures which promise the multiplication of high legal offices. Indeed, this is a circumstance never to be lost sight of in discussing plans of judicial reform. We have in the outset of these observations noted the wise dictum of an illustrious magistrate,—his warning against teaching Judges, that if the business of their Courts gets into arrear, new helpmates will be given them. We consider it our duty to guard the Government and the Public against another pressure, likely enough at all times to be exerted in favour of creating new legal offices, the direct interests of the Legal Profession.

The Scotch lawyers, it is understood, are anxious for a change in the Appellate Jurisdiction of the House of Lords. They complain that there is a heavy arrear of undecided appeals. The arrear is of two kinds—cases not yet heard, and cases heard, but not decided. To this it is answered, that the arrear is temporary and accidental; for there was no arrear at all at the end of the Session 1850—all the causes set down previous to that Session had been heard, all the causes heard had been decided. It would be somewhat too absurd to make a general and permanent change in the established course of the House of Lords, because during a single Session the business had fallen into arrear. But it is alleged that a Chancellor may be appointed who never had any experience of Scotch cases; that this has happened, and may happen again. The answer is, that Chancellors who had never happened to practise in Scotch causes have been found fully adequate to conduct the appellate judicature, and have given entire satisfaction to the suitors. Lord Lyndhurst, during his first Chancellorship, had no help from any Law Lord acquainted with Scotch procedure, and he had never probably seen a Scotch case—certainly never above one or two—when he came upon the Woolsack; yet he left no arrear when he quitted it, and no complaint was ever made of the judgments which he moved.

Those who are anxious for a change in the Appellate Jurisdiction seem aware that there cannot be any plan adopted which should assimilate the hearing of Scotch cases to the hearing of English and Irish, by calling in the Judges to assist the Lords. The objections to this course are quite

insuperable, as we showed in our Number for last February. Therefore another plan is suggested — that of giving the House Scotch Law Assessors. “Create a great officer,” say the projectors — “endow him amply, in order that you may obtain a person of eminence in the profession — a person in whom the Lords can confide; and you thus furnish their Lordships with the help they now stand in need of.” But wherefore must it be one, and not two or three? In the multitude of counsellors there is safety, said the wise man; and perhaps of all counsellors this applies most to assessors, who are to give both information and advice, and who may be a check on each other as to the information they communicate, they being somewhat in the nature of witnesses as well as counsellors. To the Scottish mind, too, we should apprehend that if the creation of one such highly distinguished and amply endowed place be agreeable, the creation of two or three would not prove otherwise than acceptable; that, at all events, our Northern brethren might make up their minds to bear the evils which such an extension of the plan would produce, of increased office and patronage, in consideration of the increased benefits it would confer upon the constitution of the supreme judicature.

But we have all along been supposing the new formation, whether in the singular number or the plural, to be mere assessors. Would it be so? We more than doubt it. The argument in favour of giving this help to the House of Lords assumes that those who preside over its judicial business are unacquainted with Scotch process. Then would they not rely altogether, or almost altogether, upon these Assessors? If there were but one, we take it to be clear that this would be inevitable. But were it not so, can any one doubt that in England it would be universally and firmly believed to be so? There cannot be a doubt that the judgments of the three would go forth to the people — aye, and to the Court and the Bar of Scotland — as those not of the House of Lords, but of the Assessors. Would this give them much weight? Would it clothe them with the authority which hitherto they have had? Would the Profession — would the Judges — be satisfied to have one of themselves set up in authority over the thirteen Judges of Scotland? It must be ever borne in

mind that hitherto the Chancellor has been a person of eminence at the English Bar; and this has given him both greater authority with the Scotch Court, and a greater title to that authority, by giving him a greater general judicial capacity. The Scotch Assessor would be wholly without any such claims to deference—he would be a mere Scotch lawyer.

But there is a further objection to creating either one or more such high offices. There is not enough, or any thing like enough, to employ them. It was stated in our Number for February, from the returns before Parliament, that the average of Scotch causes for the last twenty years was twenty-seven yearly. How many of these turned upon mere Scotch law? Certainly nothing like the majority—probably not above a third. The rest were on points of mercantile law, or of evidence, or of construction of statutory provisions; on all of which the opinion of the gentlemen from Scotland would not only be unnecessary, but would be of really no value compared with that of the English Law Lord or Lords. Then observe the result of this. That important individual would be richly endowed for the purpose of working eight or nine days in a year. But that is not all: he would become, from want of practice, daily less and less fit to do his work on those few days; and as to his being of any use to the House (which has been suggested) on English Law or Equity cases, we conclude that he would carefully avoid the ridicule of answering any questions put to him on such matters, in case the House should ever happen to incur the yet greater ridicule of putting these questions.

We have heard it said that there being little or no confidence in the Appellate Jurisdiction as now exercised, this would speedily revive were the proposed change to take place. We think the want of confidence is not well founded, and that it will speedily pass away. It arises mainly from the arrear; and with that arrear it will, we hope, cease. But as to the confidence expected from making an Assessor, there has enough been said in discussing the plan to show how little reliance can be placed on that. Half the Profession (in Scotland) is for one, their political adherent; half for another, standing in the same relation to them. We may be quite

certain that the confidence will follow the choice; and that any thing like a general assent to the judgments of the House will be as little to be expected as a general assent to the choice of the Assessor.

It ought, in these discussions, never to be forgotten, that while all must admit the anomaly which arises from the appeal on Scotch causes lying out of Scotland, all are equally ready to allow that, generally speaking, great satisfaction has been given by the manner in which the judicial business has been conducted; that many of the most important decisions on points of mere Scotch Law have been made by English lawyers, with the entire assent of the Scotch Courts, even where these decrees have been reversed; and that the judgments of the Lords have been received with unvaried deference and respect at all times by both the people of Scotland and the Profession, chiefly because they were *not* the judgments of persons belonging to the Scotch Court. He must be a very bold speculator who will have the confidence to pronounce the same result from a Court of Appeal, moving under the officer whom it is proposed to import from Scotland; and assuredly any thing more hurtful both to the judicial system of the country and to the House of Lords could not well happen, than in ceasing to command the respect of its people and their Judges.

ART. XII. — OFFICIAL INVESTIGATION OF TITLES.

Outlines of a Plan for insuring the Stability and reducing the Expense of investigating Titles to Landed Property by means of their Official Investigation and Certification. By HENRY TYRWHITT FREND, Barrister-at-Law. London: Benning and Co. 1850.

Copy of a Report dated May 3. 1851, from the Incumbered Estates' Commissioners of Ireland, with respect to their proceedings. Ordered by the House of Commons to be printed May 5. 1851. No. 258.

To many of our readers it may have been matter of regret that the Session of 1851 has been allowed to pass away

without securing for the Public the long-anticipated advantages of the General Registration of Assurances. The subject of Registration had been so carefully discussed in the elaborate Reports of the Real Property Commissioners; the bill which was to regulate the system had apparently been framed with such elaborate exactness; the attempt to introduce a similar measure had so often been repeated, and that too under the auspices of many who seemed eminently qualified to pronounce in its favour, that the very delay which has reserved the final discussion of the present scheme for another Session might naturally lead to disappointment, if it were not held to presage ultimate failure. Failure, however, we do not anticipate; the demand for an improved system of dealing with the assurance of land is daily becoming more imperative, and we have little doubt that Registration, in some shape, must be involved in any such system. Meanwhile, the very delay may have its advantages. An opportunity is afforded for a more accurate investigation of the details of the proposed scheme; the objections which have been urged against it may be examined; and if any of them prove unanswerable, there is at least time to introduce amendments. And, indeed, it would be too much to expect that any scheme involving such large and important changes should be found free from imperfections; yet, were its operation better understood, many of the objections which have appeared to possess the greatest weight might cease to be formidable. Thus we think its introduction might be considerably furthered by a short exposition of some of the features of the present system of investigating the title to real property, and of the results which would probably be consequent on Registration; that is, if, as we doubt not, such an exposition could be made sufficiently intelligible to be interesting to general readers, or at least to those readers who are personally concerned in the reduction of the cost of the examination of title.

Our present object, however, is not so much to direct the attention of our readers to the details of the system of Registration as to bring before their notice a scheme for the employment, under certain circumstances, of official inves-

tigation in matters of title,—a scheme which would appear to be almost indispensable as a supplemental measure in order to secure the full advantages of Registration, but which, even viewed independently and apart from this measure, may be well worthy of attention. The proposition is not a novel one; indeed the principle on which it is founded has, as most of our readers will be aware, been already adopted in certain cases in Ireland, where it is used in connexion with the General Register; and the experience of the working of the system there employed appears sufficient to warrant the conclusion, that in a *modified form* it might be very advantageously extended to England. It may be well to refer at greater length to these examples in Ireland, as hereafter we shall take leave to found some arguments on them, when we attempt to anticipate some of the objections to which the scheme is open. First, then, under the 11 & 12 Vict. c. 48.¹ (Ireland), where land in Ireland is subject to any incumbrance, the owner is empowered to enter into a contract for its sale, subject to the approbation of the Court of Chancery, and may afterwards make application to the Court to confirm the contract; or the owner or certain of the incumbrancers may at once make similar application for an order for sale. Upon either of such applications the Court may make a reference to the master to inquire into the particulars of the proposed sale, and on receiving his report may order a sale, and the assurance made upon such an order vests the land in the purchaser *absolutely and indefeasibly* (subject to the saving of certain rights, *e. g.*, tithes, existing tenancies, &c.). An owner or incumbrancer may also, in certain circumstances, sell without the order of the Court; but, in this case, the purchaser does not obtain a title *as against all the world* until after the expiration of five years from the time of his purchase. Secondly, under the 12 & 13 Vict. c. 77. (Ireland),² a sale by the Incumbered Estates Commissioners gives an absolute and indefeasible title (subject to exceptions similar to those to which we have before alluded). The Commissioners can also make orders in certain instances for partitions and exchanges. And conveyances, &c., made for the purpose of carrying out such partitions and exchanges, are to

¹ See Sections 27. 28. 43. 44.

² See Sections 27. 28.

be conclusive. An assurance made under this last-mentioned Act is also to form a new head of title for the purpose of Registration (13 & 14 Vict. c. 72. § 5. Ireland). It may be added, that under each of the Acts 11 & 12 Vict. c. 48., 12 & 13 Vict. c. 77., various powers are given for facilitating sales, among which may be particularly mentioned the power of apportioning rentcharge. The objection may, however, be urged, that these Acts severally relate to incumbered estates only; in regard to which they sometimes enable the owners of limited and partial interests to enforce sales; but we need scarcely observe that, in referring to them, it is not our object to call attention to the system of *forced* sales, but merely to the principle which has here been recognised, — that in certain cases, absolute and indefeasible titles can be *safely* conferred through means of official investigation. It will be seen in the sequel that the occasions for which we advocate the adoption of the same principle in England are chiefly those, in which a sale can now be ordered by a Court of competent jurisdiction, or where all the parties interested in any property are in esse and competent, and are willing to consent to a sale. Before, however, proceeding to examine at length the cases in which its application would be most suitable, and the modes of carrying it into effect, a few observations may be useful on the advantages, which would accrue from it when employed in connexion with a General Register.

Among the benefits to be derived from Registration it will be sufficient, for our present purpose, to notice the following: that no assurance executed subsequently to the introduction of the General Register is to prejudice a purchaser or mortgagee, unless it appears upon the Register. So far therefore as the Register goes back, he may be satisfied that he has the *complete* title before him, and he will no longer be put to expense or inconvenience in order to arrive at the proof of the negative, — viz., that no document which might materially affect his interests has been suppressed. But let us suppose that Registration is confined to those events and assurances only which take place or are executed subsequently to its introduction; — and what will be the prac-

tical effect? In that case its advantages, however important, can but be gradually developed. The mere existence of a General Register will not, independently of any collateral measure, dispense with the fifty or sixty years' title which is now usually required. Thus, supposing it to be established in the year 1852, although it might satisfy a purchaser in 1860 of the completeness of the title subsequent to 1852, yet, in regard to the previous title, the same kind of investigation as is now usual, would obviously still be necessary. If, however, a plan could be devised by which, *at the option of the parties interested*, the whole title to any specified property could at once be placed upon the Register; then, as to such property, the beneficial operation of Registration might be at once experienced; and such in effect is the result of an official investigation like that of the Incumbered Estates Commissioners, which cuts the knot by wiping out all the previous title, and furnishing a certificate or assurance which is to form a new head of title in the Register.

The success, however, of the plan of official investigation of title is not involved in the existence of a General Register. On the contrary, the scheme possesses many intrinsic advantages, and for the sake of these Mr. Frend, in his pamphlet, proposes its adoption independently of Registration, which he, however, allows would be a "very desirable adjunct" to its operations; but these advantages may perhaps be discussed with more convenience after we have referred to the modes which have been suggested for carrying out the scheme. These are twofold:—first, a Commission specially appointed for the purpose; secondly, an alteration in the practice of the Court of Chancery. With regard to the former, which is advocated by Mr. Frend¹, we cannot do better than present our readers with his own outline of it. He proposes:—

¹ Mr. Frend (p. 8, &c.) makes some useful comments on the scheme which has sometimes been suggested of assuring land in the same way as stock, by means of transfers in the General Registry; in other words, by making the Register itself the *legal* title to land, instead of being the criterion of the *completeness* of the abstract of title which may be furnished. Mr. Frend dwells upon the difference of the subject-matter of stock and land. To the former a merely *numerical* value attaches; while as to the latter, the identity of the

" I. That there shall be constituted, by Act of Parliament, a Board or Court of paid Commissioners, sworn to secrecy, whose duty it shall be to examine into such titles to landed estates as are *voluntarily* brought under their official inspection.

" II. That the Commissioners shall, on the completion by them of the examination of each title submitted to their notice, grant a sealed certificate, descriptive of the precise state of all the then existing estates, rights, and interests, both legal and equitable, in the land; for which purpose the applicant for the certificate will of course be required to produce to the Commissioners a complete abstract of the title, and to verify it, as well by the production of the originals of the abstracted documents, as by proof satisfactory to the Commissioners, of the occurrence of such deaths, marriages, births, heirships, and other extraneous matters, as are essential to be proved in verification of title disclosed.¹

" III. That in order to aid the Commissioners to perform the functions of their office with a due regard to the *possible* interests of third parties, and at the same time to simplify, as far as may be, the contents of the official certificates, the Commissioners shall be invested with the power of submitting doubtful points of *construction* on written documents, in the form of cases for the opinion of the Judges, whose decision on the points submitted to them shall (after due notice for, and argument on behalf of the persons possibly interested under the doubtful document) be final.

" IV. That an official certificate shall not be issued until after

subject-matter has itself a value. We may further remark, that a trust (separating the legal from the beneficial ownership) may prove less convenient in the case of land than in stock, because the former requires a greater degree of *personal* superintendence from the cestuique trust than the latter.

¹ " It will be observed, from this and the following fourth and sixth heads of the proposal, that the insertion in certificates of an express saving of the rights of third parties, claiming under instruments *not* produced before the Commission, is not contemplated. It appears to me that, by requiring sufficient publicity to be given by advertisement of the intention to certify a title, previously to the actual grant of the certificate, and by suspending the conclusive operation of the certificate for five years after its date, the rights of third parties will be amply guarded, while the value of the certificate would clearly be fearfully depreciated, were it to contain such an express saving of rights as above alluded to.

" Although not so mentioned in the text, it might be found requisite to append to each certificate a schedule, or for the Commissioners to preserve a list of the documents perused by them, *not*, of course, for the purpose of fixing purchasers or mortgagees with notice of, or the necessity of inspecting those documents, but merely of determining whether claims made during the suspensory period of five years, do or do not arise under instruments already adjudicated upon."

the intention to grant the same shall have been sufficiently notified by advertisements, to be inserted in the *London Gazette* and in one or more newspapers circulating in the immediate locality of the land, the title to which is to form the subject-matter of the certificate, — such advertisements not necessarily disclosing the intended contents of the certificate, but describing, in general terms, the locality and boundaries of the estate, the title to which has been brought under the Commissioners' notice, and requiring or calling upon all claimants (if any), not parties to the application for the certificate, to come in before the Commission and produce and support their claims.

“ V. That the Commission shall be invested with the power of directing issues to try the validity of disputed rights or claims, or, at the option of the applicant for the certificate, to grant the latter conditionally or in subjection to such disputed rights or claims.

“ VI. That an official certificate shall, on its grant, be *prima facie* evidence of the state of title thereby certified, and (by analogy to the old law of non-claim on fines) shall, after the lapse of five years, be final and conclusive evidence against all the world.

“ VII. That the original of each certificate shall be preserved and registered, and an office copy thereof be evidence. And (but this is of more questionable expediency) that the register of certificates shall be open to public inspection, and constructive notice to all persons.

“ VIII. That whenever certificates are granted, upon the application of tenants for life, or other partial owners having the lawful custody of the title deeds, (and the custody of, or control over, the deeds, it may be here remarked, would necessarily be a condition precedent to the application for a certificate), the costs of the application for, and the grant of the certificate shall, at the applicant's option, be charged on the land, and be made payable to Government, with interest, by yearly or other periodical instalments.

“ IX. That the Commission shall be primarily paid out of the Consolidated Fund, but ultimately by the owners of estates, the titles to which are certified.

“ X. That the Commission shall be empowered to grant either general and absolute or special certificates; thus, if any given applicant satisfactorily prove that he is absolutely seised in fee simple, the certificate would be absolute and unconditional, and simply certify the applicant's seisin in fee at some given date; but if, on the contrary, the question of whether the applicant is or is not seised of the fee depends upon an unproven fact, such as that of

his elder brother having died childless, then the certificate will be special and conditional, and certify to the effect that the applicant is the absolute owner, if his brother died childless.

"XI. That the Commissioners shall have power to frame rules (certified by them to, and approved of by, the Lord Chancellor or one or more of the Common Law Judges) with regard to the nature of the evidence to be received and admitted of extrinsic facts, relative to other matters necessary for the guidance of the Commission in their operations.

"XII., and lastly. That trustees for minors, and others under disability, shall (subject, of course, to proper checks) have the same power of applying for certificates as their *cestuis qui trustent* would have possessed if of legal capacity; the costs of the application in such cases being either charged on the land, or paid out of the general trust estate."

The second plan to which we have referred consists in alteration of the practice of the Court of Chancery, under which it might be invested with the power of granting certificates of a similar character, or at least, on the occasion of any sale made under its own direction, of conferring on the purchaser an absolute title.

To show the change in practice which would be introduced in the case of any sale made under the direction of the Court, it may be well first to notice the proceedings which are at present usual under similar circumstances. Suppose, then, a decree made that a given property shall be sold with the approbation of the Master, and that the sale is thereupon carried out under conditions which have been framed with his sanction. The intended purchaser investigates the title in the usual way, and, if satisfied with it, can proceed to complete his contract. If, however, upon looking into the abstract, he meets with any objection which cannot be disposed of out of Court, he must procure an order for reference to the Master to look into the title.¹

We believe that an idea is prevalent that a sale by the Court of Chancery will *even now* confer an absolute title, but, not to mention the circumstance that a purchaser who agrees to buy, subject to special conditions, contracts for

¹ See Dan: Ch. Pr. pp. 1195, 1200, 1201.

merely qualified title, it is plain that, if he accept the title without a reference to the Court, he does so in reliance on the discretion only of his professional advisers; and even in those cases where he takes the opinion of the Court, it is submitted that, however much such an opinion may be entitled to deference as an authority, it is only binding on those who are parties¹ to the suit. If so, it follows that, although the judicial sanction of a sale might *primâ facie* be presumed to afford some guarantee that it is properly made, and that the Court in making the order for a sale has not interfered with or overlooked the rights of any one who might be entitled to oppose such an order,—that is to say, that the title is indisputably good,—yet, in practice, it cannot be inferred that such is the fact; at least, so far as relates to the system at present employed by the Court of Chancery. And hence, in cases where property has been sold under the Court, in the event of any fresh dealings,—as, for instance, upon the occasion of a sale or mortgage,—the usual investigation is generally adopted; whilst the only effect of the proceedings in Court will probably have been a material increase in the number of documents of title, the length of the abstract, and the consequent expenses.²

But may it not be possible, among other Reforms in the proceedings of the Court of Chancery, to introduce into its practice proceedings founded on those principles which are carried out in the Acts relating to Ireland, to which we have already referred?—For instance, to take those cases only in which the Court has at present authority to direct a sale;—supposing, in the first place, a reference be made to the Master directing him to inquire, whether all those parties, whose concurrence might be desirable, were before the Court,—

¹ In *Bennett v. Hamill*, 2 Sch. & Lef. pp. 577, 578., Lord Redesdale observes, “A purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the *parties*, and that it has on that investigation properly decreed a sale: then he is to see that all proper parties to be bound are before the Court, and he has further to see that taking the conveyance he takes a title which cannot be impeached *aliunde*, he has no right to call upon the Court to protect him from a title *not in issue* in the cause, and in no way affected by the decree.”

² See Preston on Abst. vol. i. pp. 188, 189, 190.

that with this end in view, the Master investigated the title and reported thereon; and that he were also empowered to add new parties to the proceedings as might appear expedient; and lastly, that the Court, upon the Master's Report, exercised its usual discretionary power, by refusing a sale: with some additional precautionary measures with reference to the kind of investigation to be made by the Master, the nature of the evidence to be required, and the degree of publicity which it would be incumbent to give to such proceedings,—would it afterwards be hazardous to provide, that in the event of an order absolute for sale, a purchaser should therefore be entitled to obtain an order vesting the subject-matter of his bargain in himself, and that such order should confer upon him an indefeasible title, and might be inserted in the general Register as a new head of title? Moreover, if the system could be worked out in the Court of Chancery in reference to those sales which now come within its ordinary province, there does not seem to be any reason why it should not be extended even to other cases, so as to confer upon the Court the power of making absolute vesting orders, or granting absolute or conditional certificates, such as those suggested by Mr. Frend, which might, under certain circumstances, be employed to facilitate such sales, partitions, exchanges, and other dealings of a similar character as would be ordinarily carried out independently of the Court of Chancery.

Such an assertion may at first sight seem paradoxical,—the expenses of any proceedings connected with the High Court of Chancery are usually so enormous, that people hesitate before they have recourse to its assistance;—but let us consider some of the advantages which might be anticipated from the existence of an authority capable of conferring indefeasible titles.

By the plan proposed, whether such authority were vested in a Commission or the Court of Chancery, *one* official investigation only would take place as a preliminary measure. This, it must be admitted, might prove more costly than an examination into title as at present conducted (independently of the Court); as well from the degree of accuracy which would be indispensable, as because it might sometimes be

necessary to take the opinion of the Court on points of doubtful construction. But, on the other hand, the costs which are now incurred in preliminary examinations of title for the purpose of settling conditions of sale, would go some way towards defraying the expense of an official investigation; and this task once completed, however numerous the purchasers might be, the *vendor* would be wholly relieved from the necessity of incurring any further expense or trouble for the supply of either abstracts or evidence.

Then again the *purchaser* could afford to give a higher price, as he too would avoid expense, whilst at the same time he obtained property enhanced in value by the simplicity and security of the new title. Thus, he would avoid all the expense of investigating the title,—he would receive a short¹, and therefore inexpensive, species of assurance, as all recitals and covenants for title would of course be omitted; and the only documents of title would at once be handed over to him, so that he would never be subjected, either to the expense of obtaining a covenant for the production of any of the earlier documents of title, or, after having obtained such a covenant, to the trouble and difficulty of putting it in force. Again, upon any fresh dealing with the property, there would be no occasion to incur the expense and delay of perusing the title for the purpose of preparing conditions of sale, and the depreciation consequent on conditions of sale would be avoided: a sale or mortgage might be at once completed without the delay which is at present requisite for the perusal of title on behalf of the purchaser or mortgagee, and which so frequently causes the most serious inconvenience; and lastly, any mortgagee or new purchaser could, like the first purchaser, afford to make a larger advance, or give a higher price. Such, we submit, would be the natural consequences of the simplicity of the new title; at least, until, by a series of subsequent dealings, this title had been again rendered complex.

But the benefits of the scheme are even still more obvious in regard to property which is of such a character that,

¹ In an assurance from the Incumbered Estates Commissioners, the conveyance itself, a tolerably lengthy schedule of parcels, and a plan, can be brought into the compass of a single skin of parchment.

independently of the expense attendant upon the investigation of title, it would realise the best price if sold in small portions. Such is frequently the case with land adapted for the purpose of building; and here, even if the title be in other respects satisfactory, yet, if it be long and complex, the economy of the scheme would be equally apparent; for the cost of a separate abstract, and separate perusal of title for every small portion, is often so disproportionately large in comparison with the value of the portion itself, as entirely to neutralise any advantage which might be derived from the subdivision of the property.¹

As applied to those cases which are even now brought under the cognisance of the Court, the economy of the scheme is, if anything, still greater; for here one abstract is prepared, and one investigation required as a preliminary, in order to ascertain what special conditions of sale should be adopted;—upon the sale, a fresh copy of the abstract and a second investigation is required by the purchaser, or every purchaser if their number be more than one:—the objections taken by any purchaser, either to the title or the form of the conveyance, may be made the subject of a reference to the Master², and even then, exceptions may be taken to his Report, and the matter be finally brought before the Court.

¹ The following cases are instances:—In the first (which lately came under our own observation), property fitted for building and mostly held under the same title was put up for sale in upwards of ninety lots,—an individual lot, apparently of average size and value, only fetched the sum of 165*l.*; while the abstract furnished to this lot extended over more than 60 sheets. We recently heard of a similar instance in which building ground was sold in small lots by private contract, and although the title was by a special condition limited to commence in 1812, it was stated that the costs of the *vendor* for furnishing abstracts, &c. amounted to about 200*l.* per acre, whilst the gross purchase-money only averaged 380*l.* per acre. Contrast with these the following statement, copied by the “Times” of Sept. 29. 1851, from the “Freeman’s Journal:”—“As an example of the very moderate sum for which an estate can be sold in this (Incumbered Estates Commissioners) Court, we may mention the case of Samuel Dopping, owner, which estate was sold, and the amount, 76,225*l.*, distributed, for the small sum of 321*l.* 1*s.* 5*d.*; another, in the matter of Arthur Robinson, owner, sold for 9200*l.*, the costs of which, including survey, printing, rentals, and distribution of the fund, amounted to but 197*l.* 1*s.* 11*d.*” And see an instance mentioned in the “Times” of Oct. 15. 1851, where the high prices fetched at the sale of an estate are attributed to its having been put up in small lots.

² See Dan. Ch. Pr. pp. 1190, &c., and 1204.

Instead of all these proceedings there would be but one investigation, which would at once clear up all difficulties; and we submit that the usual result would be, even in the first instance, not only a saving of expense, but also of time.

The chief objection to the scheme as compared with the system at present in use, seems to consist in this, that the former would neutralise the effect of one of the principal existing safeguards against fraud. The security of the purchaser now depends upon his own diligent inquiries, and the very precautions taken by him for his own interest may prevent the rights of third parties from being overlooked, and consequently from being defeated; but if once he could be relieved from all responsibility, any investigation on his part would become superfluous, and hence the security of any claimants other than the vendors, would then depend only upon the vigilance of the official persons, to whose scrutiny the title would be submitted. Here however, we appeal with confidence to the authority afforded by the example of the Incumbered Estates Commission. By a return to an order of the House of Commons, dated the 5th of May last, it appears that the number of estates sold to March 31. 1851, was 253, having an acreage in the whole of 227,329 A., 3 R., 34 P., of which 210,000 were probably arable, being about $\frac{1}{6\frac{2}{3}}$ th of the arable land of Ireland; the total amount of purchase money of these estates was 1,350,616*l.* 0*s.* 4*d.*; and they had been disposed of to 587 purchasers, nearly one half of whom were purchasers of lots that sold respectively for sums not exceeding 1000*l.*¹

However much this Commission may have been condemned on account of the depreciation which has resulted from the immense amount of property, which it has at once forced into the market, we hear few, if any, complaints against the working of its machinery; and if the system can be safely applied to Ireland in the case of incumbered property, why should it not with equal safety be extended to England in the case of property, either unincumbered or which would, according

¹ It is stated in the "Times" of Sept. 29. 1851, that the total number of estates sold up to the 23d September was 440; the amount of sales 3,654,500*l.* 12*s.*; the number of conditional orders for sale 1450; and the number of absolute orders 1253. The number of conveyances executed to purchasers is stated in the "Times" of Oct. 16. 1851 to be 999.

to the present system be sold under the direction of the Court.

It can scarcely be a condition precedent for the success of the principle, that the only subject-matter to which it is applied should be *incumbered* property. That circumstance might indeed afford ground for a *forced* sale, but not for any *mode* of sale which, for the sake of an incumbrancer, would be calculated unduly to risk the infliction of injury on any other person. Even granting that the change would occasionally involve hardship, it might on the other hand prevent results, which, though in accordance with the established doctrines of Equity, can scarcely be regarded in any other light than as cases of practical hardship. It may be very true that a mere speculator who, when conscious of existing defects in any title, would consent to complete his purchase on the understanding that a reduction should be made in the price of the property, can have but little claim for the assistance of the Court of Chancery as against third parties; but the case of a *bonâ fide* purchaser, who gives an adequate price seems widely different. *He* surely is not unworthy of the protection of the Court, at least in comparison with others whose title may, according to the Refinements of Equity be superior; but who from neglect to assert such title have given opportunity for inequitable proceedings on the part of the vendor.

Further than this, the system now so prevalent of selling subject to special conditions of sale appears practically, if not theoretically, objectionable; for though it may be alleged with a show of reason, that a purchaser who buys subject to special conditions¹, does so with his eyes open, and must therefore be content to abide the consequences; still, the fact is, that in nine cases out of ten, a purchaser's notion of their nature is so vague, that he cannot be said to be really cognisant of them. His judgment, too, is influenced by that which more immediately attracts his attention,—the external character of the property offered for sale. He must often form his decision hastily whilst in a state of comparative

¹ See some pertinent remarks on conditions of sale and their effect in Hayes's Conv. vol. ii. p. 204. &c., 5th ed.

ignorance, and must therefore labour under great disadvantage when dealing with a vendor, who knows his position, chooses his own occasion, and can act in the most guarded manner. Special conditions may indeed be frequently imposed, in order to obviate the necessity for complying with the trifling, or sometimes whimsical requisitions which are prompted *ex superabundante cautela* of the conveyancer; but as they may also be made a trap for ensnaring an unwary purchaser into contracting for property with a very complex title, at a price which would be reasonable only on the supposition that such title were really clear, simple, and straightforward, they seem to operate with undue severity on the purchaser; and any measure which would tend to diminish the employment of them might prove eminently beneficial.

We submit then, that the scheme of official investigation is, in itself, one well worthy of consideration; we may add that it appears to possess this further excellence,—that it might be introduced without causing any violent or sudden change; for although it might facilitate forced sales in those instances where they may now be required, it would not give rise to any *new* occasion for them; and in all other cases it would be employed only with the *consent* of all proper parties; and its application would therefore be gradual and inoffensive. Further than this, independently of its bearing on Registration, it appears to be a measure which would eminently tend to simplify title. Grievous indeed are the complaints which are urged against the complexity of title; many the schemes which have been suggested for improvement; whether these would be found sufficiently practical in their character may be questionable, but at any rate official investigation would seem to be a condition precedent to their introduction.

Assuming, however, that the system be sufficiently advantageous to merit its adoption, the question remains how it would be best carried out; whether by a Special Commission for the purpose, or by an adaptation of the machinery of the Court of Chancery. From the experience which the public have had of the Court of Chancery and the Incumbered Estates Commission, there can be but little doubt that the

preference would be given to a Commission. Yet there does not seem to be any reason why, with judicious changes, operations of the Court should not be carried on with as much economy and despatch, as that of a Commission; and even if the latter were adopted, some arrangement might be made which would extend its working to those sales, which in the natural order of things would still come under the cognisance of the Court of Chancery. Granting that the change would be really desirable, the expense of a Commission should be but a small obstacle; and assuming that a General Register should sooner or later be introduced, such a Commission might perhaps be usefully attached as part of the machinery of Registration. But if the creation of a Special Commission is thought inexpedient, we see at least no reason why, and the various reforms of the practice of the Court of Chancery measures might not be adopted for introducing some uniform and efficient system of Official Investigation of Title.¹

ART. XIII.—BAR ETIQUETTE.

1. *Bar Etiquette.* In reference to the rule requiring the intermediary agency of an Attorney between Counsel and Court, with an analytical account of the alterations in Practice proposed by the Common Law Commission. By JAMES STEPHEN, Esq., of the Middle Temple, Barrister-at-Law. London: Butterworth, 1851.
2. *Advocacy in the County Courts.* A Letter to Sir ALEXANDER COCKBURN, M.P., Her Majesty's Attorney-General. By a Barrister of the Inner Temple. London: Sweet, 1851.
3. *County Courts.* A Letter to Lord Campbell, Lord Justice of England, on the Bill now before Parliament.

¹ We need scarcely remind our readers of the analogy which the present system bears to that of the "fines" of our ancestors, or that the principles which it is founded on are recognised in those cases of such frequent occurrence, in which, on a purchase under a "parliamentary title," the distribution of the purchase money is entrusted to the Court of Chancery.

altering the character of the County Courts, by extending their Jurisdiction to 50*l*. By JOHN WARRINGTON ROGERS, Esq., of the Middle Temple, Barrister-at-Law. London: Benning and Co., 1850.

NONE of the various investigations which the general demand for Law Reform has given rise to in this country has been entered on with greater zest by the English public than that of the unwritten Code of Laws which peculiarly governs the Legal Profession itself. Our readers will remember that this subject has on more than one occasion been recently touched upon in the *LAW REVIEW*: and we now cheerfully accord to the able writers of the three pamphlets before us the credit which is so justly due to them for discussing in an open, candid, and fearless, but decorous manner, matters so extremely delicate for junior barristers to handle as the *etiquette* of the Bar, and the conventional rules by which the Bar of England are governed. A considerable movement took place on this subject last spring, chiefly among the junior Bar, and these works are some of its symptoms. They will probably be followed by more important results.

We do not apprehend that other than good can come from such discussions. We have as little fear of an authentic announcement that in England the lawyer's "occupation's gone," as of a retrograde movement to that rude state of society when every man is his own builder and his own clothier. With a hundred schemes for simplifying, cheapening, and reforming the Law of England, the steady mind of John Bull is pretty well made up that lawyers, as well as physicians, engineers, and architects, are useful in their particular calling; and our fellow citizens are not very likely to think worse of the Legal Profession after being enabled to look through that thick hedge of conventional rules with which the English Bar is bound round. The Bar is still regarded in this country with respect, and events of too recent occurrence to refer to more particularly have tended to impress on the public mind the necessity of securing the wholesome check which their presence affords against the capricious exercise of judicial power.

We fear then not the prying eyes of public scrutiny. Law Reformers we sincerely believe the Bar of England to gain rather than suffer by a general reform of the Profession. There is just now a growing feeling in this country that many instances the forms and ceremonies which attend mere retainer of lawyers create expenses wholly useless to the client, and having nothing analogous to them in the cost of professional assistance of any other kind; and it is to perhaps that we may fairly attribute most of the attempts of late years made to discourage the Bar practising in newly created tribunals. One of the objects of Mr. Stephen's pamphlet is to show the present expensive formalities which ordinarily attend the *taking counsel's opinion*, or *instructing* barristers as advocates. Pleaders or draftsmen with advantage both to the Bar and the public, be for the most part dispensed with; and though we do not quite enter into Mr. Stephen's views, we cannot help acknowledging that there is very considerable force in his arguments.

As our professional readers well know, by the existing etiquette of the legal profession, if a merchant or other person stands in need of advice on a difficult question arising, or a legal document of any kind requiring the skill of counsel is to be prepared, or the cause of any party is to be advocated in Court, members of the English Bar can only give their services after the *client* has gone through the expensive ordeal of a number of preliminary attendances, note taking, consulting, &c. &c., on the part of an attorney, whose bill of costs for such services will generally be at least six times the *honorarium* actually awarded to the barrister.

The natural operation of such a system is to act as a prohibition in such cases against the employment of counsel at all, to induce the client to substitute for sound advice the impressions of the attorney who is first called in, and frequently, after a long course of litigation, to submit to an unsatisfactory and costly compromise rather than take the opinion of the Court. The press have, on the part of the public, frequently and loudly complained of these Barristers who suffer so severely by them have long said that they ought to be abated, but they nevertheless con-

in all their force; and whilst the tendency of modern legislation is to extend the field of professional practice of the attorneys and solicitors of this country, and to derogate from the exclusive privileges of the Bar, English barristers, who have of late years increased in numbers at a formidable rate, are, with hardly an exception, still tenacious observers of those restrictive rules of etiquette which prevent recourse being had to their services, except at the discretion of an attorney.

Various remedies have been recently suggested by members of the Bar to prevent the evils we have alluded to. The proposition of Mr. Stephens is, that "a number of barristers, sufficiently numerous to command attention, and to produce a *revolution*, not a rebellion, should, by manifesto or otherwise, pledge themselves to see and transact business for clients desirous of their assistance, without the intervention of an attorney, in all cases not inconsistent with the provisions of 6 & 7 Vict. c. 73."

"Let us consider for a moment," he observes, "the practical working of such an alteration.

"Take the example of the sale of a piece of land from A. to B. The title we will suppose short, and free from difficulty; the parties to the transaction able to accept and willing to convey; the purchase-money of 500*l.* forthcoming. A. and B. having made an appointment with Mr. C. (the Barrister) and provided him with the title deeds, and a memorandum of the nature of the transaction, call on the day appointed, and the one pays the 500*l.* and takes off his conveyance, which the Barrister in the mean time has drawn and caused to be engrossed and properly stamped at the next law stationer's, and the other pays the stationer's bill and the Barrister's *honorarium*; amounting both together, say to 6*l.* 6*s.*, with 3*s.* 6*d.* for the clerk. Compare this with an attorney's bill¹ under the present *régime* in respect of the same transaction! We are sure we should be under the mark if we were to fix it, with its 'attendings' on the client, 'attendings' on the counsel, and 'conferences' with both, and all its other circuitous items, at three times that amount.

"Again, A. has, or fancies he has, been aggrieved by B.: he again resorts to C.'s chambers; and either draws up a case with

¹ See a specimen, *antè*, p. 185. n. 1.—ED. L. R.

his clerk, on which he will in a few days receive a written opinion; or states the facts, *vivâ voce*, to the barrister, by whom if an action is advisable, he is furnished with a declaration, and instructed how to sue out and serve a writ; and subsequently (supposing the suggestions contained in the present report are to be carried out) the barrister will either draw up a case, to be submitted to B., for the determination of a jury, or will tell A. to go to an attorney and have the evidence properly collected and the case got up for trial.

"It is useless to multiply instances, for enough has been said to show the nature of the proposed alterations. The most simple and uncomplicated cases have, of course, been used as examples and preliminary steps, which are often necessary, supposed to have been satisfactorily arranged; and it is obvious that it would be generally necessary for a barrister to keep clerks of a different description from those now in use, and well versed in the routine of business, or else to commit the practical working of his chambers to an attorney. In short, the probable result would be the introduction of hybrid establishments, partly in the nature of an attorney's office, but the sanctum of which would be tenanted by a gentleman of the long robe, instead of its present occupant, and the charges made in which, while they would include all the really necessary steps forming the items of an attorney's bill, would be optional instead of compulsory on the client; as consulting the barrister he would be informed of the fee expected for the whole business, and would then proceed with the affair as he chose." — *Stephen*, pp. 31, 32.

It is but just to Mr. Stephen, who thus broadly grasps the subject, to add his concluding remarks on the evils which may arise from the change.

"It is not without a pang that we can seriously contemplate the possibility of such an alliance, fatal to the distinctive and time-honoured character of either branch of the Profession; and the only consolation which presents itself to our mind is, that, if it shall so turn out, this subversion of so ancient and honourable a profession as that of the Bar has not been effected by suicidal hands; that they have not been the aggressors in this contest, but that they have succumbed wisely, though with unfeigned reluctance, to circumstances over which they have had little control."

And, for our own parts, we hope that the era of the hybrid establishments referred to by Mr. Stephen, and of the al-

lute destruction of the English Bar, which it will ultimately bring about, is more remote than he is disposed to believe.

If a system of open competition between barristers and attorneys in this country were to be substituted for the present allotment of labour and profit between the two branches of the Legal Profession, there can be little doubt on which side the pecuniary advantage would ultimately be; and in many cases, of course, the suitor would also be the gainer. Nothing would tend to improve the race of barristers so much as the early responsibility of actual practice. This it is that makes the sound and skilful lawyer. Mere desultory reading — abstract speculation on Law — does little for the mind: but give a young man two or three cases, the management of which shall rest on him, and he may discover that he has mistaken his calling, but they will do more to bring out and develope the legal faculty, if he has it, than years of daily and midnight toil over his law-books. They will discover to him the real *pinches* of the case; they will show him what portions of the Law are necessary: in one word, they will *teach him his business*.

Let us now see what the other propositions are to ward off the apprehended danger to the rising members of the Bar, from their having too readily surrendered their old and legitimate position in the practice of the law.

The author of the *Letter to the Attorney-General* urges with some reason, that if the existence of the Bar — the practice of advocacy — is to be countenanced at all in this country, barristers ought to be encouraged in — at all events should not be excluded from — the County Courts, in which it is not impossible the bulk of the business hitherto transacted in Westminster Hall will henceforth be conducted. His observations on this subject are very sensible.

“ Should we not, consistently with every economy to the suitors, ensure to them the best and most respectable attorneys — the most intelligent and respectable advocates? If, then, Professional advisers have been hitherto too highly paid in the Superior Courts, let the scale of fees in the County Courts be taxed in proportion to the amount recovered. But do not, in the vain hope of cheapening the expenses of the suitors, allow a class of practitioners to grow up in the new County Courts who unite the

double character of attorney and advocate without the respectability of either; and whose tenderness for the pockets of their clients will last only until they have received for themselves a monopoly in the Courts in which they practise."—*Barrister*, p. 17.

The class of *attorney-advocates* who now habitually attend the County Courts are very properly exposed by this writer; and the very fact of their existence is sufficient to show that, under any legislative regulation, advocacy must be a distinct vocation. This is so in the Bankruptcy Courts, where, though all solicitors have a right to plead, a very small number enjoy a practical monopoly; and the same result has now taken place in the County Courts, with the exception that in these the *attorney-advocates* are of a very inferior grade. The writer's suggestion is simply to substitute regularly educated barristers for this objectionable class.

"All I urge is, that there be left to us the privileges and rights which, being essential to our very existence, we have hitherto enjoyed without discussion. Leave to the Bar the right of exclusive audience, and the right to be instructed by the parties to the action.

You will then, without interfering with the right of each party to advocate his own cause wherever he may, under the protection of the Judge, be competent for the task, afford, to those who require it, the assistance of respectable attorneys and of able advocates, and secure to the public the right to employ counsel without the intervention of an attorney, in any cases where the Bar may see fit to depart from their general and very salutary rule of etiquette. Nay, more, you will encourage the formation of an efficient Local Bar, whose presence in the Courts, while ensuring the dignity and order of the proceedings, will give powerful support to the presiding Judges, and will offer the best guarantee for that uniformity of decision in the Superior and Inferior Courts which alone can produce certainty of justice to suitors."—*Barrister*, p. 19.

Mr. Rogers augurs from the existence of the County Courts the gradual extinction of the English Bar.

"The Bar will, of necessity, become dispersed: some men will leave the Bar for the more dangerous, though more enticing, attractions of political excitement; some men will locate themselves in

the provinces, to contend for the business of the Local Courts with the *attorney-advocates*, a race just now crawling into existence, and into the practice of the County Courts — creatures very properly shunned by the more respectable attorneys."— *Rogers*, p. 13.

We are, however, not afraid of any such serious consequences ensuing. We can see no more inconvenience arising from the Bar attending the County Courts than at Quarter Sessions. The Bar of the Northern Circuit wisely resolved at the Grand Court on the last autumn circuit, held at York, that there is nothing derogatory in members of the Bar attending and sitting in these County Courts, and forming a Local Bar, and holding guinea briefs there. No sensible junior will, after this, deem it at all *infra dig.* to attend an adjacent County Court. Nor have we any alarm of the attorney-advocates. Perhaps it might have been proper to have stopped them originally. As it is they cannot be interfered with except by the barrister fairly beating them out of the field by his superior ability.

We have not room to make further quotations from the publications before us. But the subject of the practical operation of *Bar Etiquette* upon the relative provinces of Counsel and Attorney in this country, is peculiarly adapted for discussion at the present moment. Having, unfortunately, no College or Faculty of Advocates, no Forensic University, not even a *Bar Club* to keep watch over the general interests of the Profession, the Bar of England, whose collective energies are represented by the dining-tables of the four Inns of Court and of the eight circuits, have allowed their province to be gradually invaded, the old and salutary system of professional distinction to be frittered away, and their independence to be in no small degree jeopardised, first of all by gradually adopting the usage of surrendering their clients to the absolute and uncontrolled influence of attorneys, and then carelessly looking on whilst the attorneys have usurped the entire general practice of the Law, discarding (as it is natural to expect they would) the services of barristers altogether, when they can venture to rely on their own personal exertions, or when the cheaper assistance of *Gentlemen practising*

under the Bar can be found, and too often unblushingly apportioning their clients' cases, where the services of barristers are indispensable, amongst their own immediate relations, whom the present *independent* system offers such peculiar encouragement to enter our Inns of Court.

How long, then, is this system to go on? Will the Rulers of the Inns of Court still attend term after term at the Bench tables, and see no duty left for them to perform but to superintend the dinners, and let out the chambers at a profit? Is the business of the Circuit mess to be confined to the imposition of fines for frivolous omissions? We hope a reaction is already begun,—that the Bar, before it is too late, will imitate the prudent example of the other branch of the Profession, and unite in asserting its true rights; in exercising a really effectual control over their order, in preventing improper persons being admitted at all to the degree of Barrister¹, impose a course of study and discipline upon the members and students, an effective examination as a qualification to practise, and a general and effective control over the Profession, so as to secure the real efficiency and independence of the Bar. If there is truth in the observation, that the gradual replenishment of the ranks of the Bar by drafts drawn more or less directly from the body of attorneys, has by degrees rendered it almost a matter of impossibility for any one to succeed as a barrister unless he trace his pedigree from this source², it is surely useless for Chief Justices gravely to lay down the maxim, “that no connexion should exist between the two branches of the Profession which would be likely to lead to any malpractice in either.”³ Individuals, unless controlled by a recognised authority, can hardly be expected heroically to prefer the well-being of the

¹ As an example of the persons now admitted to the Bar, the following case has been mentioned to us. In the police force of one of our provincial towns a man who had been a private soldier has, by good conduct, risen to be superintendent. Having obtained this rank, he thought it would improve his position to become a Barrister. He entered an Inn of Court, and has obtained this degree without the slightest inquiry as to his knowledge of Law.

² Bar Etiquette, p. 26.; and see *antè*, Art. I.

³ Per Lord Denman in *Exp. Bateman*, 6 Q. B. Rep. p. 853.

order to which they belong to their own personal interests. Every thriving attorney may, under the present system, advantageously provide for one son, at least, as a barrister; and less prosperous attorneys may, *per fas aut nefas*, manage to get rid of the expenses of Counsel's fees altogether; whilst barristers without an attorney connection may, if they please, carry on the practice of the Law wholly independent and in defiance of all the attorneys on the Roll; but the highly respectable Law Societies in this metropolis, and throughout the country, would probably soon take up the matter, on finding that such a system of unscrupulous free trade must in a short time put an end to the profits of a solicitor's business altogether, and the dormant energies of our Bar Institutions would wake up at the shock, instigated at last by the mere instinct of self-preservation.

The present state of things, however, cannot continue; either some authentic announcement of the rules of professional etiquette must be made, or individual members will discard it altogether. The time appears to us to have arrived for the formation of an Institution, which, representing the true interests and present feeling of the Bar, will assert and protect its legitimate rights. The Inns of Court appear to be useless for any such purpose; the Judges would be probably unwilling, and perhaps unable, to take the proper steps; the Bar must act for themselves in the matter, but they have full power to act effectually.

An Institution of this nature would be able to preserve discipline and decorum, at least, among the ranks of the Bar, and detect and punish dishonourable conduct in attorneys and solicitors; but it could do more; it might, with the aid of the societies representing the other branch of the Profession, arrange for the decent adjustment of the line of demarcation which should henceforth separate the barrister from the attorney, securing the interest and advantage at the same time with the real efficiency and honour of both branches; or, if this were found impossible, it might readjust the rules of etiquette, with a view to the true interests of the public, and explode rules which are practically evaded every hour of the day.

It is now no wonder that the Legal Profession should evince symptoms of uneasiness, or that barristers especially should be taking a review of their position to see in what direction they can break through the narrow circle within which their energies are cramped and confined. It is hard for men possessed of a superior education, conscious of great mental power, and often of eloquence, which lacks nothing but the opportunity to dazzle and astonish, to linger away the best years of their lives in waiting for an occasion which may never arrive, and which no efforts of theirs can accelerate. It is hard for men who have been the light of their college, and the ornament of their university, to linger unemployed from ardent youth to disappointed middle age in the dusky purlieus of our Inns of Court, and watch the positions of honour and distinction which they feel the proud consciousness of being well able to fill, occupied one by one by their inferiors in every respect, solely by virtue of their connection with some influential and active attorney. Prizes, medals, first classes, wranglerships,—all are outweighed by this single advantage. Without it there is scarcely a chance of success, and with it, to a man of the most ordinary intelligence, hardly a possibility of failure. Harder still is it for the haughty and independent spirit to stoop to court that success by mixing with society for which he has no taste; and by deferring to persons every way his inferiors to remedy that unspeakable misfortune to a barrister the not being by birth the son, or by marriage the son-in-law, of a solicitor in large practice. It is very bitter to feel, that not only is he ostracised from the profession of his choice, possibly for being too much of a gentleman to condescend to the arts by which those in whose hands the subsistence of the Bar is placed may be conciliated, but that he is dragged at the chariot-wheels of his more fortunate competitors, and augments their triumphs by the reputation of talents which have not even procured him admission into that legal arena, where others every way his inferiors are daily exhibiting themselves. And if a little ray of hope does dawn upon him, and he sees a few papers adorn his table, how often is the barrister, who has nothing but the etiquette of the Profession to protect him, forced to choose be-

tween the degradation of working for nothing for an attorney who has obviously employed him because he believes him too poor and too eager for business to venture to ask for his fee, and the loss of the only client whom years of that hope deferred which maketh the heart sick have brought to his chambers. We know nothing so closely resembling the position which the barrister now occupies in relation to the attorney, as the dependence of a friendless author upon a patron, or a publisher, in those melancholy days of English literature, when the reading public was too small to raise the successful author, as at present, to a position of opulence and independence. It is for these things, much more than for the loss of cases under 50*l.* transferred to the County Courts, the very idea of litigating which at *Nisi Prius* is a disgrace to the administration of justice, that we think the Bar justly entitled to sympathy, and even commiseration.

Nor ought the public to be indifferent to such a state of things. It is eminently the interest of this free country, that the prizes and honours of the Bar should be open to men of the most distinguished talents, the most extensive and varied acquirements, the highest and noblest aspirations. The Bar is the guardian of public liberty; and that sacred trust ought to be reposed in no vulgar hands. The Bar is the natural reformer of our Law, and that duty must be discharged by minds capable of apprehending the abstract principles of Jurisprudence and Morality as well as the narrow precision of technical rules. To secure this high standard of professional excellence, the public has an interest in supporting the only means by which it can be obtained: free and unlimited competition. But alas! as the Legal Profession is constituted, that competition exists no longer. Of the three thousand four hundred Barristers whose names appear in the Law List, how few are there in the present day who are allowed to enter the lists for the prizes of their noble Profession? "The race is not to the swift, nor the battle to the strong," because the swift and the strong are doomed to stand idly by, and see the prizes which ought to be theirs, contended for by the feeble and the slow. From these various but concurrent causes, the *morale* of the Legal Profession is

gradually lowered, and men who have nothing to recommend them but the possession of every faculty which should make the learned lawyer or distinguished advocate, are gradually discovering that the Law is no Profession for them. But the public has another interest in the question. In order to keep up this system of nepotism and patronage, and to enable the attorneys not only to carry on their own legitimate business, but indirectly to monopolise for their own families and connections the whole emoluments and honours of the Bar, a heavy tax is levied on the public in the shape of additional fees. The rules of professional etiquette, powerless to shield the barrister, who is too independent to seek for business by indirect means from attorneys, are inexorable in preventing him from obtaining it without their intervention. Your case may lie in a nutshell. It may be contained in a single deed, in a single letter; it may turn on the wording of a promissory note, or a bill of lading, but you cannot take it directly to the barrister for his opinion. It must pass through the office of the attorney, and several guineas are expended in taking instructions, in preparing a case, in laying the case before counsel, and so forth, before you arrive at the point which you might have reached at once. Thus, is the access of the public to men possessing legal knowledge rendered difficult and expensive, for no other purpose that we know of than to perpetuate the subordination of barristers to attorneys, and secure the monopoly of patronage which attorneys now possess. The truth is, the Legal Profession is turned upside down; the curse of Esau, "that the elder should serve the younger," has descended upon it. Those who are nominally its heads, are really its "hewers of wood, and drawers of water:" and those who assume the modest title of its subordinate ministers, are really its rulers and directors, its patrons and its arbiters. The Bar is fast becoming a splendid slavery, honoured with precedence and nominal superiority, but really held in humiliating and almost servile dependence. Its servants are its masters, its inferiors are its patrons.

The cause of this inverted and unnatural state of the Legal Profession, fraught with so many evils to the Bar and to the

public, is only too manifest. It does not arise from any encroachment of the attorneys, but simply and solely from the manner in which the Bar has entangled its own feet in the meshes of its own etiquette. In the anxiety to make the Profession gentlemanlike and select, in the indulgence of a sickly unwholesome appetite for exclusiveness, which most erroneously considers contact with the clients for whom they act as derogatory to their dignity, they have fenced themselves round with an etiquette which forbids them to see a client except through the intervention of an attorney, and have thus abandoned with suicidal folly to the inferior branch of the Profession, the noblest and most dignified portion of the duty of a lawyer, the office of Jurisconsult. That duty of giving advice to all comers which the noble Senators of Rome were proud to discharge, and in which they found a sure and blameless road to the highest honours of the Republic; that duty which the ancient Serjeants of England discharged, when each seated by his pillar at St. Paul's, with his writing materials at his knee, he took down the complaints and answered the questions of clients; the modern Bar of England is too squeamish, too delicate, too exclusive to perform; and the man, who for a couple of guineas will wrangle for half a day with a burglar turned approver, a drunken farmer, or a refractory navvy, recoils; with all the sensitive reserve of a fine lady, from listening to the plain statement of his case from the lips of a gentleman as well educated and refined as himself. Instead of elevating the Profession, this mawkish etiquette has degraded it, and whatever the barrister has gained in exclusiveness, he loses in independence. Intellectual and educational superiority ought, in a natural state of things, to carry with it power and control; and if one branch of the Profession must be dependent on the other, it is the attorney who should look to the barrister, instead of the barrister to the attorney. The reason why this is not so, is simply and solely because the attorney sees the client first. This rule, made by the Bar themselves in the childish desire of personal dignity, bids fair, if persevered in, to leave them no dignity at all. Suppose that physicians were to make a rule that they would see no

patient without an apothecary, the inevitable result would be, that the apothecaries would be their masters and the patronage of the Medical Profession would pass from the public into the hands of its lower branch. As it is, the physician holds his own, and the dependence is, as it ought to be, of the inferior upon the superior practitioner. Did barristers adopt the same rules as physicians, the same results would ensue, and the patronage of the Profession would change hands. Then, indeed, a man of talent might hope, by the strength of his character and the reputation of his abilities, to break through the charmed circle which is now drawn round our Courts of Justice, and the advantages of mere Legal connection would sink into insignificance compared to the real recommendation of learning and eloquence. We are convinced that nothing but a vigorous effort can save the Bar of England from the degrading destiny which we have pointed out; and it is most fortunate that the complete remedy for the evil is entirely in their own hands. They are placed in this unhappy position through no Act of Parliament, through no combination of the attorneys, but through the suicidal folly of their own self-imposed laws of etiquette, which has actually forced upon the inferior branch of the Profession the patronage and power which properly belong to the counsel learned in the law, whose duty originally was to advise their clients as well as to advocate their causes. This position of superiority the Bar has seen fit to abdicate. It is, however, in their power to resume it. They have the authority of the House of Commons for saying that such a rule ought not to prevail in the County Courts; and we can hardly believe, that when their attention is once drawn to the subject, they will be so wanting to themselves and their Profession as to insist on perpetuating their present inferior and dependent position by adhering to a rule of etiquette which has stript them of the noblest duties as well as of the most solid advantages. What, then, is the remedy for this state of things? All that is necessary is, A UNION OF THE BAR FOR THE PURPOSE OF SELF-DEFENCE.

ART. XIV.¹—LAW AMENDMENT IN SCOTLAND.

1. *Report of the Committee appointed at a preliminary Meeting to consider and report on the proper Constitution of a Law Amendment Society in Glasgow, in connection with the London Society for promoting the Amendment of the Law.* 1851.
2. *First Report of the Special Committee of the Town Council of Aberdeen upon the Amendment and Assimilation of the Commercial Laws of England and Scotland.* 1851.

WE are gratified to learn that the subject of Law Amendment has, in the present Autumn, become a topic of lively interest throughout Scotland. In Glasgow, an Association composed of eminent merchants and lawyers has been formed, called "the Glasgow and West of Scotland Law Amendment Society, in connection with the London Society for Promoting the Amendment of the Law."¹ And in Edinburgh, a similar Society is in the course of formation. In the city of Aberdeen, and also in the important mercantile town of Dundee, the magistrates and town council have passed resolutions agreeing to co-operate cordially in promoting the same object: and in Perth, a Committee of the London Society has been established, of which Mr. Sheriff Barclay is chairman.

The Law Amendment Society of Glasgow has two objects in view; the one to amend the Law of Scotland, the other to assimilate the laws of England and Scotland; but the Town Councils of Aberdeen and Dundee seem to direct their efforts chiefly to an entire fusion of the commercial laws of the two countries.

¹ The following list of Officers will speak for itself to any one acquainted with Glasgow.

"Chamber of Commerce, Oct. 9. 1851.

"At a Meeting of the Law Amendment Society held here this day, the following Gentlemen were elected Members of the Council for the following year:—Messrs. Andrew Neilson, Andrew Bannatyne, William P. Paton, James Gourlay, John Kerr, James A. Anderson, Alexander McDowall, H. E. Crum, William Crawford, Sir James Anderson, James Hannah, Robert Lamond."

On the subject of amending the Law of Scotland, we find, in the Report issued by the Glasgow Society, the following pertinent remarks:—

“ The amendment of the Law of Scotland may be viewed in two lights. In the first place, there are many of its provisions which are in themselves objectionable. These have generally had their origin in a state of society very different from the present, and are consequently found, in many respects, to be ill adapted to regulate the rights, the intercourse, and the transactions of the existing generation; at the same time, these provisions are so interwoven with the social system, and form the basis of so many monetary arrangements, as to render alterations difficult, and to demand great care and circumspection from those who devote themselves to their amendment. The tenure, whether feudal or on lease, and the mode of transfer of heritable or real property; the rules of succession, both in real and personal estate; the solemnities requisite to constitute, and the evidence admitted to prove, the contract of marriage; may be cited as affording numerous instances in which amendments of this class are required.

“ Illustrations may be easily given of the imperfections in our Law now referred to. For example, if a father die intestate, leaving a son or daughter, and a grandchild by a deceased son or daughter, his whole personal estate passes to the son or daughter, to the exclusion of the grandchild. Again: a mother, although a widow, does not, on the death of her only child, succeed to its estate, whether real or personal. No blood relation, however near, can succeed through the mother. On the dissolution of a marriage by the death of the wife, if there are no children, and if there has been no marriage settlement, the whole personal estate of the surviving husband, from whatever source derived, and whatever may be its amount, must be divided forthwith — one half being retained by the husband, and the other half handed over to his deceased wife's nearest relations. Many provisions in other departments of our Law might be mentioned, which, however just and expedient in a poor community and rude state of society, are, to say the least, of questionable propriety in the present social condition of the people of this country.

“ During the last forty years much has been done to improve the administration of justice in Scotland. The constitution of the legal tribunals, and the mode of pleading, have both been improved. But much remains to be done; and the just complaint

of litigants of the delay, expense, and uncertainty which still attend proceedings in our Courts, as well as the progress which is being made in England by the establishment of Local Courts, where claims not exceeding 50*l.* in amount are expeditiously and, it is believed, satisfactorily disposed of, without written pleadings, should at once incite and encourage us in seeking farther improvements."

With regard to the important object of assimilating the laws of England and Scotland, we call the attention of our readers to the following observations, which we extract from the same valuable Report:—

"The second class of cases requiring amendment of the Law, arises from the rapidly increasing intercourse, and the numerous mercantile transactions, between persons in England and Scotland. The mere discrepancy between the laws of the two countries, especially in mercantile affairs, has become a source of great inconvenience and expense.

"On these points a fuller explanation is, perhaps, required. The two kingdoms of England and Scotland, although united for more than a century under the title of Great Britain, may, nevertheless, in relation to their Laws, and to the tribunals by which these Laws are administered, be considered as foreign to each other. The Courts of Law and of Equity in each are entirely independent of those in the other, and no greater effect is given in one country to a decree pronounced in the other, than would be given by either to a decision pronounced in France or in Spain. The attendance of a witness in England cannot be compelled in Scotland, nor *vice versâ*. An Englishman, unless he comes to reside in Scotland, can only sue in the latter country by a mandatory. A title requires to be made up in each country to the personal succession of a deceased party, dying possessed of shares or stocks in both. No effort seems to have been hitherto made to obviate these and many similar disadvantages, originating in the anciently disjoined and frequently hostile position of the two kingdoms.

"But, further, the laws of England and Scotland, in those particulars where the intercourse of life now brings the inhabitants of the two kingdoms into daily contact, are in many respects different. A Scotch merchant, who has goods to purchase or sell, or bills to negotiate, or an open account to sue for, or a claim to render effectual in bankruptcy, in England, must do so subject to

laws which are, in many respects, different from those which prevail in his own country. The form and mode of attesting deeds of all kinds, the rules of evidence, and the prescription or limitation of debts and obligations, are in many respects different. A copartnery subsisting both in England and Scotland, (of which we have frequent examples,) has the rights of its copartners regulated by a different law in the one locality, from that which prevails in the other.

“The bad results of this very anomalous state of matters are daily becoming more apparent. The difficulty which professional men in either country feel in advising their clients as to vindicating their rights in the other, brings the evil home to them, as well as to the parties themselves whose interests are at stake. The time, therefore, has come when the laws of the two divisions of the island should be gradually assimilated; and the exertions of your proposed Society cannot be more usefully applied than in forwarding this truly national object.”

The Report of the Aberdeen Town Council specifies a number of discrepancies in the laws of the two countries. A few of the instances, set out in that Report, will enable our readers to perceive that that influential body is also engaged in a work of much importance. The Report proceeds thus:—

“There is a remarkable distinction between the laws of Scotland and England in the doctrine relative to the implied warranty of the quality of goods, which is sometimes productive of injustice. By the Scottish Law an implied obligation is undertaken by the seller that a thing sold at the full price is of quality suitable to the declared or avowed purpose of the purchaser, and generally that the article is of merchantable quality, not merely that it will sell at market, but that it will bring a fair average market price. This implied undertaking suffers exception only in the case of faults so obvious that they cannot be supposed to escape ordinary observation. But in England, the purchaser has no implied warranty of good condition or quality to rely on, unless he has either obtained express warranty, or can prove fraud on the part of the seller.

“This conflict in the Law of England and Scotland in the implied warranty against latent defects in goods and merchandise, may be, and often is, productive of great hardship and injustice. Merchants in Scotland are purchasing daily of manufacturers and

merchants throughout England, cloth, hops, wines, seeds, teas, spices, and goods of all sorts. If any of these articles shall turn out to be of an unmerchantable quality, though unknown to him, the Scottish merchant is made answerable to his customer, by the Law of Scotland, to take back the goods and return the price; but he has no remedy, by the Law of England, against the English merchant of whom he purchased the defective article, unless he either hold a special warranty, or can prove fraud. Take the case of a seed merchant in Scotland, who purchases seed of a seedsman in England: the seed has a latent defect; it does not grow; he is liable in damages to his customers, under the implied warranty in the Law of Scotland; but he has no remedy against the English vendor, unless he can prove fraud, or have taken the precaution to procure a special warranty. That case has actually occurred recently, and has been productive of great injustice."

Another anomaly is thus referred to by the Town Council of Aberdeen:—

"In the important matter of the recovery of debts there is still another matter of which Scotch lawyers complain, and with great justice, with respect to the estates of persons deceased. It occurs every day that persons die in Scotland possessed of personal estate in both countries. The executor takes out confirmation in Scotland, but with regard to debts owing, or property belonging to the deceased in England, the Scotch confirmation is of no avail. The executor must obtain letters of administration in England, howsoever small in amount the English property or debts may be. Nay more. If it should happen that one debtor reside in Yorkshire, and another in the county of Middlesex, the executor is compelled to take out letters of administration both at York and in London. Now, the expense of taking out letters of administration in England is so considerable as often to exceed, in such cases, the amount of debts so owing to the deceased. The consequence not unfrequently is, that a Scotch executor prefers to lose the debt, and in so doing he acts prudently as the administrator of the estate."

We cannot overstate the importance of this movement, especially at the present time. Our neighbours north of the Tweed are proverbially shrewd and forward in seeing the signs of the times; they are prepared to set their house in order; they see that a great reform in the Law is inevitable,

and they are the first among the provincial towns of the empire to come forward and give it a helping hand. They have taken the lead, and we believe the provincial towns in England and Ireland will speedily follow, and that before long we shall see established Branch Law Amendment Societies in the chief provincial towns, — as Manchester, Liverpool, Birmingham, Leeds, Norwich, Bath, Bristol, York, Exeter, Gloucester; and why not Cork, Belfast, Galway, and many others?

ART. XV. — LEGAL EDUCATION.

IN the case of the *Queen v. the Benchers of Gray's Inn* in the first volume of Douglas's Reports, Lord Mansfield said, The original institution of the Inns of Court nowhere precisely appears; but it is certain that they are not corporations, and have no constitution by charter from the Crown. They are voluntary societies, which for ages have submitted to Government, analogous to other seminaries of learning. But all the power they have is delegated to them from the Judges, and in every instance their conduct is subject to their control as visitors. In the 36th of Elizabeth, it was ordered by the Judges, that none should be called to the Bar but such as be of convenient continuance, and have used the exercise of the House, as in arguing of cases, putting at Bolts, and keeping of the Moots and Exercises, three years at least, before they be called. King James the First, in the sixth year of his reign, by his Charter, did grant to Trustees, for the Inns of the Inner and Middle Temple, the said Inns and capital Messuages with the appurtenances called or known by the names of the Inner and Middle Temple, London; and all Halls, Cloisters, Chambers, Gardens, &c., which Inns, Messuages, &c., he willed and by those presents ordered to be applied for the lodging and education of the Students and Professors of the said Law, sojourning for all time to come in the said Inns. From these authorities, selected from a number of others to the same effect, and most of which have

already been laid before our readers, we think it abundantly clear, first, that the power of calling to the Bar resides in the Judges, and is only exercised by the Inns of Court as their agents, subject to be revoked like any other delegated authority. Secondly, that no one ought to be called to the Bar except he have acquired competent knowledge and proficiency from training in the Inn of Court of which he is a member. Thirdly, that the Inner and Middle Temple hold their lands on an express trust for lodging and education of Professors and Students. Thus the Inns of Court are all fixed with the duty of calling none but competent persons to the Bar, and two of them by express words bound to provide for the education of Students. And for the execution of these trusts, and the performance of these duties, the Judges, who delegated the latter and visit the former, are responsible. Having stated the covenant in which the Inns of Court are bound, it is only too easy to assign the breaches. They have neglected their duty, and they have broken their trust. Having done little or nothing to promote education within their walls, they have lowered the qualifications required from a Barrister down to their miserable educational standard, and have been at once unfaithful trustees and negligent agents. True, that four Professors have been appointed to give Lectures, in the different Inns of Court, under the penitence inspired by a Parliamentary inquiry. But what has been the fate of these appointments? The lectureship at Lincoln's Inn has been abolished by the Benchers after a little more than a year's existence, and the only fund which they ever devoted to education has reverted to swell the ways and means of their "exceedings." At the Inner and Middle Temple the Professorships still exist, but at neither have the Professors received any encouragement from the Society, or is the slightest wish expressed or inducement held out for Students to attend them. At Gray's Inn, the Society has shown a more friendly spirit towards the Professor, and something more like intellectual activity has been excited; but there as well as everywhere else the attendance on the lectures is entirely optional, and the degree of Barrister can be obtained if the money be forthcoming, and the past character be not impeached by a person unable to read or write. Are then these

Societies so poor that they can afford nothing but this miserable pittance towards legal education? There is not one of them in which more money is not squandered on the luxury of the Benchers' table than would be sufficient to provide for a competent amount of that instruction, for the sake of which the Inns of Court were founded and endowed. On the plates of the Benchers are laid the hopes, the prospects, the honour, the respectability of the Bar; and while they imagine that they are only dining on turtle, turbot, and venison, they are really devouring the Profession, whose destinies have in an evil hour been entrusted to their care. Among them all, the Society of the Inner Temple is particularly worthy of reprehension, since it allots to its Benchers chambers worth from 60*l.* to 120*l.* a year; while the endowment of a neglected Professorship, which nobody is required to attend, is all that it can spare for Legal Education. The truth is, the Inns of Court have entered into an ignominious competition which should attract most students by requiring least from them; and in this competition they all deserve to be victorious, inasmuch as they have one and all reduced their requirements of proficiency for the degree of Barrister, which is their stock in trade, to a point admitting of no further abatement. The effect of this has notoriously been, that vast numbers of persons have become Barristers without the slightest pretence to professional knowledge: and that among the 3400 graduates of these Legal Universities, there are hundreds whose call is in other respects discreditable to the Society which made it. What stronger proof of the gross misconduct of the Inns of Court can there be, than the fact that hundreds of men are admitted to practise in the higher branch of the Profession who would be utterly unable to pass even the very simple examination required of an attorney before his admission? By the treachery of those to whom its guardianship has been entrusted, the degree of Barrister has become utterly worthless. The only test which it affords is practically the pecuniary one, and that would be as well applied if the licence to practise in our Courts were sold in a bookseller's shop for as many pounds as are now paid to the Inns of Court. It is really sickening to those who have read in the pages of Coke,

Fortescue, and Dugdale, the glowing descriptions of the noble Legal University of London in the days of the Tudors and the Stuarts, to contemplate the deep degradation and degeneracy into which these ancient establishments have fallen, in an age which, whatever be its faults, is not blind, at any rate, to the advantages of education. Where are the Bolts, the Moots, the Readings, the Arguments and Pleadings, in which the student was exercised for so many painful years before he was thought worthy of a call to the Bar? Or if these methods of instruction be considered obsolete (which we by no means believe them to be) where are the improved methods which the solicitude of modern times has substituted in their place? They are gone, and all that we are offered in exchange, is the establishment of three paltry Professorships, and the assurance of Benchers fattened on the residue of the funds, that scientific Legal Education is impossible; and that the only knowledge to be obtained must come from poring over precedents and drawing pleadings. To this resolute discouragement of the cultivation of Law as a science we owe it, that the auxiliary branches of Law have so completely overshadowed in our system the Law itself; and that success in the Profession has more frequently been the reward of exact knowledge and dexterous application of the rules of pleading, than of profound research into the principles of English Jurisprudence. The time, however, is at hand when pleading will either be wholly abolished or so modified as to lose its present technical and refined character; and the lawyer will then feel how much he has lost for want of that systematic instruction in the rudiments of the science which the Inns of Court were bound to afford him. But it is vain to waste criticism on bodies, which, though frequently and vehemently attacked, have never ventured on defence, and, which, content with teaching nothing and requiring nothing to be known, trust to the chapter of accidents to prolong their existence, and, overlooked amid the pressure of more popular reforms, having no claim to commendation, only hope to be despised and forgotten.

We have now done with the Inns of Court: it remains to show what remedy is open to us. The remedy is simple

enough. The Inns of Court receive the enormous power of doing mischief which they possess and exercise from the Judges, who can revoke and remodel it as they think proper. Not only do these bodies neglect education themselves, and misappropriate funds which they hold in trust for that purpose, to the mere gratification of the senses¹, but they act as powerful opponents to independent efforts to promote legal instruction. That which they will not do for themselves, they will not suffer others to do for them. Any one who wishes to teach the Law becomes *ipso facto* an enemy to the Inns of Court. We appeal to the Judges whether this state of things ought to continue, and whether it can continue without reflecting on them the same discredit which now attaches to their delegates. If they allow the funds appropriated to intellectual cultivation to be spent in eating and drinking, and the degrees, the conferring of which they have entrusted to the Benchers, to be lavished on unworthy and illiterate persons, they cannot escape the public indignation which is already rising against their unfaithful agents. Judges are more than visitors of the Inns of Court. They, by their attorneys, the Benchers, confer the degree of Barrister-at-law; and, though clearly not accountable for acts of indiscretion or errors of judgment in that body, they cannot escape censure if they any longer suffer an honourable profession to be rendered common and worthless. We do not presume to suggest to these learned personages by what course of discipline the Benchers are to be brought to see the superiority of intellectual over animal enjoyment, or how the inveterate abuses of two hundred years can be at once swept away, and a system of useless and frivolous expenditure made to give place to the austere and pure regulations of a well-ordered university. But one thing we may venture to suggest, in all humility, as being absolutely essential, if the downward course of the Legal

¹ Happening to visit the Dining-Hall of one of the Inns of Court on one of their special banqueting days, we found the approach to the Benchers' entrance lined with hothouse plants! We know not what effect an invitation to the feast might have had on our sense of justice; but, as it was, our utmost indignation was excited at this wanton and reckless expenditure of other peoples' money.

Profession is to be arrested. Let no man be called to the Bar till he has undergone a strict and searching examination, not only as to his knowledge of Law, but as to those general accomplishments and acquirements which constitute the well-educated gentleman. Do not entrust this examination to the Inns of Court, and thus give them the opportunity of selling again the elder and nobler branch of the Profession for a mess of pottage. Let the power of calling to the Bar be left with them, but forbid them to exercise it except in favour of those persons who can produce a certificate of competency from a Board appointed by the Judges to examine them. The necessity of passing this examination would naturally create a demand for legal instruction, and that demand would as naturally call forth the supply. By a proper appropriation of the funds at their disposal, the Inns of Court might do much to increase the quantity, and improve the quality, of the instruction. Instead of their present emulation, which shall sink to the lowest level, the examination, once established, would engender a really salutary rivalry, just as the university examinations at Oxford and Cambridge operate as a stimulus to the different Colleges. We should hope to see Lectureships multiplied out of the retrenchment of gastro-nomic superfluities, and a class of men arise much wanted in our law, who, devoted to instruction and possessing learned leisure, would develope its principles, and solve its difficulties; to whose opinions on abstract points of Jurisprudence, Advocates, and even Judges themselves, might defer without discredit. There are few cases where so slight an alteration would produce such important consequences. We sincerely trust it may be made by those who can effect it with so much ease; but if not, the matter cannot be allowed to rest here. The aid of Parliament must be invoked, and we feel persuaded that the case which we have stated has only to be laid before a British House of Commons in order to put an end to a system, disgraceful to the Benchers, degrading to the Bar, and not remotely tending to compromise those learned persons to whose care, as visitors *ex officio*, is entrusted the discipline of the Inns of Court.

We find it stated in the newspapers that, on the opening

of the next Session, Lord Brougham is prepared to forward a plan for the establishment of a Law University. We do not know how far this is correct; perhaps the way is rather a father to the thought. This paragraph goes on to state that a project of this nature could not be in better hands, considering as his lordship has been for so long a period with Law Reform and Education. We need hardly give in our assent to the plain proposition, and can only express a hope that there is some authority for the statement. In the mean time it seems clear to us that the Lord Chancellor and the Judges might do much to establish some system of legal education.

Whatever the intention, the effect of the establishment of the Inns of Court was to encourage the study of the Civil Law, as contradistinguished from the Roman. The Inns of Court fell naturally, as Blackstone tells us, into a collateral order. And the Judges perceiving that in these seminaries an academical discipline was enforced, and perceiving also that the degrees conferred by the Governors, or Benchers, were granted in general to merit only, accepted the certificates of the Inns of Court as conclusive tests of the fitness of candidates to practise in the Courts.

What was at first simply convenient became at last imperative; and we may now safely say, that for upwards of four centuries there has been no other channel to the legal profession but the certificate of the Benchers, who thus hold the key which alone the door is opened to all the higher honours of the Legal Profession.

This is perhaps the origin of the visitorial power vested in the Queen's Judges, who from time to time repaired to the Inns of Court for the purpose of ascertaining that the business of legal education was properly conducted, and to estimate the value of the certificates. In the event of any slackness in that respect, the Judges had an easy remedy in their own hands. They had only to tell the Benchers, "Gentlemen, we find you are neglecting your trust, and thus violating the contract upon which we agreed to accept your certificates. There has been too much eating and drinking here of late, and too little study. Beware of this in the future, otherwise we shall be obliged to disregard your certificates, and either examine the candidates ourselves."

devolve the duties upon others who will perform it more faithfully than you have done."

There is perhaps no record of such an admonition; neither is it necessary to suppose its delivery. But it seems clear enough that the Judges might interfere, and are by law bound to interfere, when it has become notorious that the power of calling to the Bar has been abused.

The petition then that we would prefer to the Lord Chancellor and the Judges is, "appoint an Examining Board, and confer upon it the power to grant law degrees."

NOTE (A) TO ART. I. p. 31.

A NOT uncommon practice has been to receive payment of sums of money on account. That it may be possible that under these circumstances payments may be charged to the clients in the country which are not made by the agent in town, appears from a late case before Lord Langdale, M.R., in which the attorney in the country made an application to tax the bill of his London agent. This case disclosed transactions which we apprehend is by no means unusual in the Profession, but which drew down some strong observations from the late Master of the Rolls. "Amongst other acts of misconduct," said his Lordship, "with which the respondent is charged is this, that he has, in his bill of costs, charged as disbursements for fees paid to Counsel, various sums of money, which in fact *never were paid*, or which, if paid, *were less in amount than the fees charged*; and Mr. — (the country attorney) has sworn that Mr. — (the London agent), on being remonstrated with on the subject, replied, 'What matters it to you? You are not a loser; if I charge you, you charge your clients.'"—*In re Smith*, 4 Beav. 314.

This is rather questionable morality. His Lordship continued: "I cannot part with this case without stating my regret, that a practice likely to lead to great abuse has arisen. I had always understood, that it was irregular for Counsel to receive from their client any sum of money except for stated and specific fees for particular matters of business done, or to be done. It is quite obvious, that to receive money generally on account, without specifying the causes, and matters, and each particular fee, leaves the client open to imposition in a manner that might otherwise be avoided. I cannot help hoping that the circumstances which have occurred in this case may tend to restore where necessary the former course of conducting business between Counsel and Solicitor."—*Per Lord Langdale*, M.R., 4 Beav. 317.

NOTE (B) TO ART. I. p. 33.

WE have thought it might be useful to inquire into the practice relative to the payment of Fees to Counsel in Scotland. The source from which we have obtained it, may be thoroughly relied on.

It is to be kept in view that, in Scotland, Deeds, &c. are not drawn up by Counsel, but by the writers to the Signet and solicitors, who are the recognised conveyancers, and who, in default of payment of their accounts rendered, have their action.

Counsel, however, *settle* Deeds, and always prepare the pleadings.

The older mode of feeing Counsel, was for the agent personally to deliver to him the Memorial (brief) along with the fee. When a consultation was the object, the Memorial was sent previously, and the fee paid immediately after the consultation. For several years past, the usual course has been to transmit the Memorial accompanied by a sealed letter, enclosing the fee, addressed to the Counsel himself.

The *rule* is, that in all cases the fee is to be paid beforehand. There may occasionally be exceptions: *first*, the older mode of feeing immediately after consultation is sometimes followed; and *secondly*, where the business is such that it is difficult to estimate the labour beforehand, the fee is occasionally sent after it is done. But the ordinary mode is to calculate previously as nearly as possible; and, if the labour exceed the calculation, to send an additional fee.

Accounts avowedly kept between Counsel and Agent are unknown. If any such exist, they are strictly secret; as such an arrangement, if proved, would be visited by high censure from the Faculty of Advocates.

Notwithstanding the rule of payment beforehand, discreditable Agents occasionally devise means of defrauding Counsel of their fees; but this is very rare, as, on a repetition of the attempt, Counsel would send back the Memorial and refuse to act; and in gross cases, recourse is had to judicial procedure.

At one time, a system of evasion was practised, with relation especially to pleadings of a technical nature, but was ultimately crushed. A pleading drawn up by one Counsel may be signed by another. Agents occasionally prepared the pleadings themselves, and sent them to A. B., informing him that they had been prepared by C. D., and requesting his signature accordingly. The signature was given in reliance on the assurance of the agent, who retained the fee, and charged it in his account against his client. In order to put an end to this system, the Faculty of Advocates passed a resolution, that the Counsel who drew up a pleading must write his name and the date of preparation on the back of the draft, and that if the engrossed copy was presented to another Counsel for signature, he was not to subscribe it unless the draft so marked

was shown to him. This rule having been steadily followed the evil ceased.

Whether Counsel in Scotland have action for their fees is doubtful, as hitherto there has been no decision of the Supreme Court. Where a Royal Burgh gave a general retaining fee, or, as it was called a "yearly pension," action was sustained at the instance of executors. This decision was upwards of a century ago, and it is obviously of a special character. In more recent cases relative to payment of physicians' fees, it was argued that those and the fees of Counsel were in *pari casu*, and that it was to be presumed that both were paid at the time. This doctrine appears to have governed the decisions; and consequently, where the presumption could be met by contrary evidence, the claim would be effectual. In a recent case, this doctrine was sustained by the Lord Ordinary, documents proving an undertaking to pay the fee, and that it had not been paid, having been put in evidence. The fee was paid, and consequently there was no judgment of the Court.

Where it has been ascertained that the monies for payment of the fees have been received by the agent but not paid to Counsel, the course is for the Counsel to present to the Court a "petition and complaint" which prays that the agent shall be censured for his misconduct, and subjected in payment of the sum claimed. It has been held, that such a petition simply craving payment, but without a prayer for censure, is incompetent.

This note will, among others things, show the use of a *Faculty*.

POSTSCRIPT.

At the commencement of a new Legal year we are thankful to be able most heartily to congratulate the friends of Law Reform on its present condition and prospects. Yet we trust we are not unreasonable if we state that this subject is not yet sufficiently appreciated. We do not exaggerate its importance when we state our belief that at present it should occupy the most prominent position in the mind of every thinking man. The commercial man cannot be benefited in a greater degree than by a ready mode of recovering his debts, an ample protection to a sound system of credit, a just system of laws relating to debtor and creditor, and a clear and intelligible statement of the legal rules which govern all his transactions. The landowner and all interested in land would, if well directed, apply themselves to unloose those fetters which restrain the ready dealing in land, and would find in the present law the greatest possible obstacle to gaining from it a remunerating profit. The lawyer is beginning to perceive that in obtaining the Reform of the Law his true interest is bound up, and that he has yet by this means to develop the real resources which his profession can furnish. But it is the statesman, the politician, the minister, who should find in this question his safest watchword. Law Reform — a real reform, the

heart and energies of the Ministry given to it—would be at the present moment the safest, and yet the most acceptable, path to follow. Law Reform, really and substantially taken up, would at once satisfy the demand for progress, and enlist the sympathies of the true conservative. This cause, as is shown in a thousand ways, has fixed itself in the hearts of the people; and a Government which would undertake to gratify their reasonable hopes and wishes, would be one of the most popular that ever existed. We speak out thus boldly, because its friends have only one thing to fear,—that a cry more noisy may interfere with its success. Never was a Parliament better disposed than the present to do justice to Law Reform; never was a House of Lords so united; never was a House of Commons so unanimous. A better may come, but we are content with the present one; and we can only foresee one difficulty; that is, that the time of the next Session may be devoted to other matters, which, however important, should not be permitted to interfere. If we do not get upon this rock we have nothing else to fear: let the friends of Law Reform be warned in time, and insist on full discussion. The hint which we ventured to give in the Postscript of our last Number as to the present anxious state of the Profession, seems to have been not uncalled for; and the contents of our present Number will, we trust, be of some service, in guiding our readers to a right conclusion. In the meantime, the Attorneys seem disposed to take the initiative. A meeting has been called on their behalf by some gentlemen of this branch, and was held at the Freemasons' Tavern, on Oct. 20., to consider and adjust the conflicting rights of Barrister and Attorney in the County Courts. Taking the fee allowed to the Bar by a late regulation of the Northern Circuit as the maximum, one guinea, the attorneys magnanimously propose to take half of this as their share; and the chairman plainly said "*that if the Bar was not satisfied with that, they would get nothing at all.*" This does not open out a very brilliant prospect of the profits to be made by an attendance at the County Courts; and according to the *Legal Observer* of October 25. 1851, "the proposal, as might have been expected, *was not at all relished by the meeting.*" As the profits of the attorneys have hitherto been considerably greater than those of the Bar in each particular case, we are not surprised at this proposal being received with disfavour. But it is not perhaps worth while saying any thing of a meeting (except to notice the fact) which does not appear to have been countenanced by the Rulers of its own Branch, and which has been content to refer the adjustment of the whole matter to the Law Society. It is, among other things, evidence of an uneasy and unsettled state of feeling on this subject, which should, if possible, be attended to by the well-wishers of the Profession; as another symptom of the same feeling we may notice a pamphlet by Mr. Harle, a solicitor, "*On the Inutility of the Distinction between the Barrister and the Attorney.*" Thus it would seem that there is no indisposition on the part of the attorneys to throw down the present barriers between the two branches of the Profession. It will be necessary, therefore, at all events, that a full and complete inquiry should take place on the subject. That this may be usefully conducted, it seems absolutely necessary that some means should exist of properly representing the Bar. It may be undignified on the part of the Benchers to have any voice in any such discussion, but we apprehend it is not the wish of the Bar to be altogether unrepresented. The difficulty that we feel in heartily recommending the formation of an Institution which should represent the Bar is, as to the materials of which it would

be composed. The Inns of Court cannot be said to enjoy the confidence either of the public or the Profession, and certainly would not be fair representatives of the feelings of the junior Bar. An institution in which the entire confidence might do more harm than good. Indeed we are for the establishment of some body which might relieve almost despair of finding one adequate for the occasion, on the ranks of the Law Amendment Society. A mock attempt by a Commission, or any of the usual palliatives, will only pointment, and encourage demands from the public which to satisfy, except at the entire sacrifice of the Profession. We again bid its present rulers look to the right adjustment of the

The new arrangements with respect to the Court of Chancery completed, and seem to have given satisfaction. The Vice-Chancellor Bruce and Lord Cranworth, have been appointed Lords Justices Kindersley and Mr. James Parker have been appointed Vice-Chancellor. We have now ample means of working the Judge-Master principle, no doubt that we shall soon see its successful commencement.

This system, we are happy to say, is now in full operation of the Supreme Court at Bombay. By the rules issued by 10th Sept. 1851, it is ordered that, "to dispose of the increased Equity, and to diminish the expenses to suitors attendant on proceedings in the Masters' Offices, one of the Judges will sit periodically ^{in one of} *Chambers, as the business may require, to conduct inquiries under decrees.*" We take especial pride in this important reform, as we have good reason to suppose that the Reports of the Law Amendment Society, and even our own humble labours in this Review, have been mainly instrumental in bringing conviction to the minds of the learned Judges of this Court on this point. The learned Chief Justice does us the honour to write to us in the following terms, which we hope we shall be pardoned, under the circumstances, for making public:—"I am able to give you most satisfactory evidence as to the good working of *videlicet* evidence in Equity Pleadings, and as to the speed, certainty, ease, and satisfaction to the parties with which decrees are worked by the Judges." His Lordship adds, what perhaps will be the most interesting part of the communication to some of our readers, "These changes have just *doubled* the amount of Equity suits brought to hearing. The returns of the business in our Courts show forcibly the effect of improved methods of procedure in the amount of business brought to trial. This is illustrative of my remark of the interests of the Profession not being injured by the interests of the public being promoted. I fear that it would not be easy to make this proposition clear to the London Profession." Our vanity will not allow us to exclude the concluding paragraph:—"May I add to you with what interest we Colonial Law Reformers look out for the 'Law Review.' It cheers us in our task; its notices of what is doing in other legal questions give us information that we can get no where else." The returns which accompany this letter fully confirm the statement as to the large increase of business; and the same results will attend the working their decrees by the Judges in this country. We end, then, as we began—SIMPLIFY AND CHEAPEN THE LAW AND ITS PROCEDURE; FOR IN THIS LIES THE TRUE INTEREST, NOT ONLY OF THE PUBLIC, BUT OF THE PROFESSION.

Trinity Vacation, Oct. 29. 1851.

THE

LAW REVIEW.

ART. I. — THE CODE CIVIL AND ITS AUTHORS.

Lois de la Procédure Civile. Par G. L. CARRÉ. Tomes 6.
3^e Edition, par CHAUVEAU-ADOLPHE. Paris, 1844.

We observe that an opinion, which we have more than
once expressed in this Journal, is daily gaining ground
with the Public and the Profession; namely, that the
amendments which are being made to reform our laws are alto-
gether too fragmentary and sectional in character. Com-
mittees on Common Law, Committees on Equity Law, draft
acts on Bankruptcy, rules for the introduction of Claims, Sir
George Turner's act for the English Court of Chancery, Sir
John Romilly's act for the Irish Court of Chancery — all of
these deal with different portions of the same great subject,
portions which are so often interlaced, that it is impossible
to touch a part without disarranging the symmetry of the
whole. It is becoming apparent to all that more compre-
hensive views are required, a systematic treatment of the
subject, above all a steady contemplation of principle. Lord
Denman's act, for example, to remove objections to witnesses
on the score of interest, was a great step in procedure; but
directly it was passed, the logical mind of practitioners dis-
covered that parties also came within the principle of the
enactment, as the only objection, to their evidence at the
Common Law, as pointed out by Chief Justice Tindal¹, was
founded on the supposition that their interest in the suit
would lead them to mendacity. Yet it has taken the best

¹ See *Worrall v. Jones*, 7 Bingh. 398.

part of a generation to give the principle full legislative effect by an act of last Session. Again, parties now being examined at Common Law, the question occurs, whether the same cumbrous dilatory and expensive procedure, which Equity practice interposed with cautious steps, when, going beyond the Common Law, it sought to extract the truth from parties who give insufficient discovery, and who are striving to keep back facts, is to be still persevered in? The point has altogether escaped the legislator, but it is obvious that the interests of the suitor are as much in question in one form of procedure as the other, and that if the whole subject had been brought before a mixed committee of jurists and statesmen,—jurists who should be something more than mere practitioners, and statesmen who should not shrink from the supposed formidable technicalities of the question, — a comprehensive law once for all would have been framed.

The interests of the Profession, no less than the interests of the Public, demand that the reform of the law, now so loudly called for, should be based on scientific, comprehensive, and therefore permanent principles. Up to the close of the last century, England was justly looked upon with envy by surrounding nations for its judicial organisation and establishments. Nay, writing so late as 1819, and after reviewing the different reforms recently established throughout Europe, Meyer does not hesitate to assign "*à la législation de la Grande-Bretagne le premier rang entre celles de toutes les nations policées.*"¹ Our own text writers, orators in Parliament, preachers in the pulpit, never mentioned the English law except in terms of eulogy. The public mind fully responded to these encomiums. Bentham, it is true, had carried his stern dissection into every portion of our procedure, and pronounced it rotten, but practitioners did not read his works, and the Public had not yet familiarised themselves with the style called Benthamese. Now, a remarkable reaction has taken place. What with the House of Commons' antipathy to lawyers, which amongst the country gentlemen portion we know is an hereditary feeling with

¹ *Institutions Judiciaires*, p. 299.

that honourable body ; the continuous but abortive efforts to introduce improvements, which every Session witnesses ; above all the gross and patent blemishes which disfigure our system, it is impossible to take up any publication of a popular character without finding long diatribes on the ABUSES OF THE LAW.

It is not difficult to explain the phenomenon. We have no hesitation in asserting, on no cursory view of the political institutions of nations, that the many difficult problems connected with the administration of justice have never been solved so successfully by any other people as by the English. The English Bench are, and ever since the Revolution they have been, a judiciary which have deserved and have obtained a higher degree of confidence and respect than the history of any other nation can boast of. Impartiality, honesty, incorruptibility, are qualities so universal as to call for no more praise than chastity in a woman. The English Bar, again, in all the faculties of advocacy bring an amount of moral weight, of learning, of zeal, of independence, and trustworthiness into the legal arena, such as no other nation has witnessed. As profound jurists they may possibly be inferior to the closet lawyers of Germany, as politicians to the patricians of ancient Rome, but from the happy circumstances connected with their caste and its position in the state, neither Rome nor France (Germany has never possessed a Bar worth mentioning), has ever been able to produce a class of trained advocates such as England, for the last two centuries at least, has supplied. The independence of the Paris Bar before the Revolution may be well tested by their conduct in the indictment brought by Judge Goëzman against Beaumarchais. The latter, having a cause pending, had avowedly given the wife of the judge a hundred louis and a watch set in diamonds, to procure him an interview with her husband, but subsequently having lost his cause, he demanded his money back from the lady, and failing to get it all, he naturally vented himself in jokes and epigrams. The story getting abroad, the reputation of the judge became affected, and he denounced Beaumarchais to the parliament as a libeller ; but, notwithstanding the facts were quite clear, and

the decree of Judge Goëzman was most suspicious on the face of it, Beaumarchais could not get a single member of the French bar even to afford him the requisite official signatures which French procedure required ; Judge Goëzman being a member of the parliament before whom the indictment was tried. A procedure that produces such a Bench, and such a Bar as exists in England, must be based on principles in the main sound, for it is the system, and not the happy choice of individuals, that is commendable for the effects denoted. Whenever, therefore, our legal institutions have been compared with those of neighbouring countries, an Englishman would naturally look upon his own with complacency. "Instances are remembered, where the weak prevailed over the strong ; one man recalls to mind where a just and upright judge protected him from unlawful violence, gave him back his vineyard, rebuked his oppressor, restored him to his rights, published, condemned and rectified the wrong."¹

Who would wish to exchange this system for the secret procedure of Germany, for the personal solicitation of Judges — the "Epices" and the "Lettres de Cachet" of France? Publicity, trial by jury, and the judicial reasons assigned for every decision of the Court, had familiarised the English public with every portion of our procedure, and endeared to them its operations.

On the other hand, the tendency of the present day being eminently financial,—it having been discovered that even gold may be bought too dear,—the inquiry at length came uppermost whether the costly article, law, might not be obtained at a somewhat less price. Questions as to the value of special demurrers began to be started ; complaints made themselves heard as to suits being disposed of on mere subtleties and technical objections ; the grievous oppression of the Masters' office gradually became felt far and wide throughout the land ; until, at length, every item in attorneys' bills has become a subject of such minute investigation that the loud and earnest demand for reform which we have before alluded to becomes intelligible. If, indeed, we look

¹ Sermon preached before the Judges at York, by the Rev. Sidney Smith.

on the subject from this exclusive point of view, we find so much to reprehend in the system, obsolete institutions once of use, but now burdensome and expensive; antiquated machinery, ill suited to effect its object; inconsistent principle in operation on all sides of Westminster Hall, but all tending to delay the suit and harass the suitor, we feel tempted to exclaim, with an indignant ex-Chancellor¹, "*Omnes has quæ hodie usquam florent respublicas intuenti . . . mihi nihil, sic me amet Deus, occurrit aliud, quam quædam conspiratio divitum de suis commodis, nomine reipublicæ tituloque, tractantium.*"

It is to be feared, and there are already symptoms in the horizon, that the laity, occupied exclusively by such financial views, may rush in impetuously to abate those nuisances which they can well appreciate, but without taking time to consider the value of the main structure, to distinguish its blemishes from its merits, or to ascertain the difficulties which must be encountered before a permanent useful edifice can be erected. We repeat, then, that the interests of the Profession and of the Public are identical in requiring a large comprehensive, and final measure of Law Reform at the present moment. The exigencies of society require, in the state of civilisation to which England has arrived, that the laws by which we are governed, the procedure by which the laws are administered, shall be made readily cognisable by every man of ordinary education. It is a disgrace to the nation, but the disgrace falls more particularly on the Profession, that the commonest right cannot be asserted, the slightest contact with a Court of Justice cannot be incurred, without frequently calling forth an amount of expenditure such as to justify the epithet "grievous." No one who investigates closely the workings of such a complicated state of society as that which surrounds us, can suppose that the various minute provisions of the law can ever be made patent to all, or that the interests of truth can be vindicated amidst the conflicts and confusion induced by fraud, oppression, and ignorance, without faculties of a high order being exerted. A trained

¹ Sir T. More.

class of professional advisers, therefore, must exist in every civilised community, to aid the unskilled, the unwary, the busily employed, wherever legal difficulties occur. But what the English Public are now demanding, and what they have a good right to demand, is, that no artificial devices for the employment of professional agency shall be interposed, when no natural want for either advocacy or professional assistance exists. Sufficiently embrangled are the current affairs of modern life without introducing complexity into simple relations which every man of ordinary education can comprehend. The problem now before the Profession,—the subject on which the science of Law, if it be a science, is to be displayed,—the solution of which problem is to identify the Legal Profession with the common interests of the country, is, to strip from our system of law and procedure every principle and practice which exists for any other purpose than the obtaining of justice in the most simple, speedy, and economic manner that justice can be obtained. The Public have already learned from the procedure of the County Courts that on simple demands not exceeding 50*l.* in amount, the claim may be either asserted or denied without the assistance of professional agency, and without expense. It rests with the professors of the law to devise machinery by which all other simple claims, of whatever amount, may be disposed of with the like facility, and to take care that the provisions for excluding error, and for subjecting all difficulties to a thorough investigation, shall never be made applicable except when really required by the nature of the case.

Considerations such as these, on what appears to us to be the prominent duty of the Profession at a period like the present, have naturally led us to turn our attention to the mode in which the gigantic scheme of Law Reform carried out in a neighbouring country was effected. All skilled witnesses who have visited France, and attended to its legal institutions,—all inhabitants of the soil whose education enabled them to contrast the present and former state of the law,—appear now to be unanimous as to the manifold blessings conferred on the country by Napoleon's Codes. The question cannot but occur, if France has been able to achieve

this great work, what is there to prevent England from equalling or excelling her in a performance of the same kind? It is true that the revolutionary period at which the work was undertaken in the former country, by completely breaking down the corporation spirit, and by silencing all class interests, enabled the question to be taken up as *res integra* in a manner neither to be expected nor desired in an old monarchy like England, full of time-honoured institutions, and, we will add, respectable prejudices. But it is the boast of our Constitutional Government, that, with the growing enlightenment of public opinion, and the consequent force it is acquiring, all sound and useful reforms may be securely achieved—it may be somewhat slowly—by the mere force of popular discussion, and without resorting to that very dangerous machinery of other countries—a revolution. We have thought, therefore, that it might be useful at the present epoch to place before our readers a general sketch of the mode in which the French Law Reformers performed their work. Writing in a distant dependency of the British Empire, where books are scarce, but attempts at codification and law reform have been numerous, we trust that our library is sufficiently well furnished to enable us to make the sketch as faithful and minute as is required for immediate purposes.

It is difficult in the present day to realise the idea of what the judicial establishments and legal procedure of France must have been sixty or seventy years ago. Enough appears from her own writers to show that, according to the universal opinion, the judges were corrupt, the Bar pusillanimous, and the attorneys versed in every species of chicanery. In criminal proceedings, the whole suit conducted in secret left the public, the family of the accused, and often the accused himself, wholly ignorant of the matters laid to his charge. In civil proceedings, where sounder principles of practice prevailed, the country was so cut up by conflicting jurisdictions that no lawyer could decide with confidence as to the proper Court for entertaining a suit; the eternally recurring questions, therefore, on competence and nullities, enabled suitors of wealth and influence nearly always to

baffle their opponents; at least such is the opinion which one finds loudly expressed in French literature. Independently of the grand division as to substantive law which ran through France, separating the country of the Roman law (*pays de droit écrit*) from the country of customary law (*pays coutumier*), the latter districts varied from one another so much as to the customs which prevailed, that a French writer does not hesitate to say France before the Revolution was absolutely without substantive law (*dépourvue de lois positives*), but was governed by usages, customs, and traditions, that varied from province to province, from town to town, and even from village to village.¹ This divarication of laws, however, might have been bearable if the administration had been good. But in France, from the earliest consolidation of the monarchy, a perpetual conflict had been in operation between the aggressive Courts of the Crown and the Local Feudal Courts, which beyond the pale of the ancient patrimony of the dukes of France possessed equal and exclusive jurisdiction with those Courts which the king created in his own domain. The royal power, however, gradually extending itself, a Crown Court, or Justice Royale, contrived to locate itself by the side of the Lords' Court, or Cour Seignurial, in nearly every part of the kingdom; and as these Courts were avowedly regarded as legitimate sources of revenue to their owners, we may well imagine the competition between two such justice-shops. On the other hand, a counter-check to the increasing despotic power of the Crown was maintained in the thirteen independent Sovereign Courts, or Parliaments, which discharged the office of Courts of Appeal in their respective provinces, and the not less important duty of modifying or annulling by way of decree, or of absolutely rejecting by refusing to register, the laws passed by the King's Government.

Such were the elements of confusion as to legal institutions which existed in that great country, that loved to consider itself, and not altogether without reason, as the leading nation, as the source of all intellectual movement, in Europe

¹ Meyer, *Institutions Judiciaires*, p. 361.

when the Revolution of 1789 occurred. A revolution which attacked every abuse, nay every institution, could not fail to apply itself to the monster evils of the law; and the early proceedings of the Constitutional Assembly and the Convention should be well marked by some of our headstrong lay reformers, who have no other remedy available but the cry, Away with them! away with them! One of the first acts of the Convention was to abolish attorneys,—a “disastrous law,” as a French writer on procedure pathetically designates it, and which certainly seems to have worked very badly by making over suitors to a set of low, uneducated, unprincipled fellows, over whom there was no control. Napoleon accordingly, on his accession to power as First Consul, abolished the new law only six years after it had been passed, and to the great satisfaction of the nation. We omit mention of a number of other wild measures which the Revolutionary Assemblies passed into laws, but which the good sense of the nation soon after repealed.

A really useful act of the Convention, and the source of all subsequent improvement in the law, was the appointment of MERLIN DU DOUAI and CAMBACÉRÉS, in 1793, to prepare a Draft Civil Code, to be laid before the Assembly. The work fell principally, we may say entirely, on the latter; and on the 9th Sept. 1794, he laid his report before the Convention, with the Code complete.¹ It was discussed at no fewer than sixty different sittings of the House; but it was strongly objected to by those impetuous Reformers, and chiefly, as we learn from the memoirs of Thibaudau, a member of the Convention, for its savouring too much of the practitioner — “sentant trop l’homme du Palais.” The Draft Code was referred to a committee of philosophers; but these gentlemen either quietly laid it on the shelf, or lost themselves in empty discussions on first principles — *proponunt multa dicta pulchra sed ab usa remota*.² On the next reconstitution of the Government, Cambacérés again brought forward the project of

¹ Cambacérés published in that year his *Rapport sur le Code Civil*, pp. 57. Paris, 1794.

² De Augm. Scientiarum, L. 8. c. 3.

a code, and made a long speech to the Council of Five Hundred, on laying an amended draft of the Code before them.¹ This draft was submitted to all the superior tribunals of France, for the criticism of the Judges, and, as might be expected, elicited an immense mass of divergent opinions. A necessary element was evidently wanting amidst such conflicts of learning, philosophy, innovation, and conservatism — the strong will of a ruler, the practical decision of a statesman — to educe any positive results; and this was soon after afforded, on the accession to power of Napoleon as First Consul, on the 18th Brumaire, An. VIII. Napoleon had scarcely descended from his war charger, after the brilliant forty days, campaign of Marengo, before he issued a decree, by which he appointed an excellent committee, consisting of Tronchet, Maleville, Bigot-Préameneu, and Portalis, to prepare a revised draft of the Civil Code. These are the *Redacteurs du Code Civil* so often spoken of. No time was lost in its preparation. The decree was dated 24th Thermidor, An. VIII. (July, 1800); and, after having been circulated throughout the empire, like the previous drafts, for the opinions of the profession, the revised Code, with the remarks made upon it, was laid before the Council of State. The Council referred the whole to their Committee of Legislation, consisting of MM. Boulay, Berlier, Réal, and others, with the instructions to frame a new draft on the materials before them. The Draft Code thus prepared was laid before the Council of State, and was discussed article by article in those celebrated sittings, at which Napoleon presided, and of which so many publications have given the account. M. Thiers presents such a lively sketch of these discussions, and of Napoleon's share in them, in his late history, that we cannot do better than translate the passage: —

“ The discussion of the Code Civil at this period (1801) in the Council of State was a spectacle that attracted universal attention. Of all the wants of France a Civil Code was the most urgent. The former law of the land, comprising feudal law, customary

¹ See *Projet du Code Civil présenté au Conseil des Cinq Cents et Discours Préliminaire*, per Cambacérés, 8vo. Paris, 1796.

law, Roman law, was no longer suitable to a society thoroughly revolutionised. The old laws on marriage, and those lately improved on divorce and successions, were neither fitted for a new state of society, nor for a regular and moral system. A draft of a Civil Code had been drawn up by Messrs. Portalis, Tronchet, Bigot de Préamaneu (*sic*), and Maleville. This draft had been sent to all the Judges for their examination and remarks. In deference to this examination, and to these remarks, the draft had been modified, and was finally submitted to the Council of State, where it was discussed article by article during several months. The First Consul, who presided over the Council, and attended every meeting, displayed such method, clearness, and frequently such depth of views, as took the whole world by surprise. Accustomed to direct armies, to govern conquered provinces, it was not surprising that he showed himself to be an administrator—for this a great general must inevitably be; but to find in him the qualities of a legislator struck the world with astonishment. His education in this character had been rapidly made. Interesting himself in every thing, because he understood every thing, he had obtained from the Consul Cambacérés a few law treatises, and, above all, the materials collected under the Convention for the formation of the new Civil Code. He devoured them, as he did the controversial religious works which he had collected when he was similarly engaged with the Concordat. In a short time, classifying in his head the general principles of Civil Law, and combining with these few notions thus rapidly acquired, his deep knowledge of mankind, his thoroughly perspicacious mind, he enabled himself to organise these important labours, and even threw into the discussion a large number of new, sound, and profound ideas. Occasionally his insufficient knowledge of the subject led him to maintain rather strange notions, but he quickly allowed himself to be brought back to the right path by the able men who surrounded him; and when, amid conflicting opinions, a question arose as to the soundest and most legitimate conclusion, he showed himself the master of them all. The chief service rendered by the First Consul towards the completion of this noble monument, was his firm mind, his determination to work steadily at the task, and thus to overcome the two great difficulties which had hitherto proved the stumbling-blocks,—the innumerable differences of opinion, and the impossibility of working continuously at such an agitated period. When, as often happened, the discussion became lengthy, diffuse, obstinate, the First Consul would sum up the whole, and

settle it by a word; and, above all, he obliged them all to work hard, by working the whole day long himself. The reports of these remarkable meetings were printed and published. Before, however, they were delivered to the Minister, the Consul Cambacérés took care to revise them, and to strike out all that might not be suitable for publication, wherever the First Consul had emitted any startling opinions, or had treated any moral questions with a familiarity of language not suitable for circulation beyond the Council Chamber. The views, therefore, of the First Consul, sometimes corrected, frequently altered, but always striking, were all that appeared in these reports. The public were astonished, and habituated themselves to look upon him as the sole author of every thing good and great achieved for France. They even felt it a sort of pleasure to contemplate as a legislator the man whom they had known as general, diplomatist, administrator, and in all these different employments superior to most of the world."¹

A doubt has sometimes occurred to us, whether the lively historian has formed the above opinions on a perusal of the long and dry legal discussions which took place in council, or whether, with the tact of a *Nisi Prius* practitioner, and the quick intuition of a man of genius, who would trust to a "ten minutes' conversation" for making himself acquainted with the existing state of a modern science, he has not presented us with a brilliant resumé of the opinions of his best informed contemporaries upon the subject. Undoubtedly, however, after a conscientious study on our part, such as becomes a writer inquiring into foreign laws, of the ponderous quartos of MM. Johanneau and Solon², we find no reason whatever for dissenting from the eulogies pronounced by M. Thiers.

Our readers may possibly not be displeased to see a specimen of the mode in which Napoleon and the French lawyers discussed some of the great questions which arose before them. The following discussion on the marriage of a wife's sister may be read with interest both by the advocates and opponents of Mr. J. Stuart Wortley's measure.

¹ Hist. du Cons. et de l'Emp. v. 3, liv. xiii. p. 299.

² Discussions du Code Civil dans le Conseil D'Etat, 3 vols. 4to. Paris, 1805-8.

The article of the Code proposed by the Committee of Legislation was as follows:—

“En collatérale, le mariage est prohibé entre le frère et la sœur legitimes ou naturels.”

The article came on for discussion on 26th Fructidor, An. ix. (16th Sep., 1801) when the debate was opened by

“*The Consul Cambacérés*, who asked if the prohibition laid down in this article extended to brothers and sisters-in-law?

“*M. Réal* states that the minority of the Committee are in favour of this extension.

“*M. Portalis* explains the views of the minority.

“He says that the civil prohibitions on marriage between brothers and sisters-in-law are founded,

“1st. On the advantage of extending connexions by matrimony.

“2nd. On the necessity of preventing the corruption of morals which creeps in with facility in the train of domestic familiarities, if marriage may be allowed to efface the disgrace.

“3rd. On the evils which spring from the degeneracy of races; for experience has shown that this is the ordinary effect of marriages between individuals of the same blood; an example of which may be seen in royal marriages.

“Prohibitions do not proceed from the Ecclesiastical Law; the most ancient are to be found in the Greek and Roman laws.¹

“The prohibition on a marriage between the aunt and nephew was introduced by Theodosius. The laws of the Church did not apply to them till a late period, when they began to interfere with marriages; up to that period the sovereign alone accorded dispensations. The first dispensation given by ecclesiastical authority was that granted by Pascal II. to the King of France about the end of the eleventh century. Princes only had recourse to the Pope, because it appeared to them unseemly that they should grant to themselves a dispensation from laws which they had established. We find even in Cassiodorus and Marculfus the formulas which were still in use. Prohibitions and dispensations, therefore, belong entirely to the Civil Law: now, the minority of the Committee has not discovered any reason for limiting the

¹ A remarkable illustration of the far-seeing views of the Bráhmans of India in many of their institutions, may be seen in the careful provisions which they have introduced into their sacred laws to prevent the degenerating of races by intermarriage.

prohibitions hallowed by the feeling of so many ages, and founded on weighty arguments, nor, on the other hand, for depriving Government of the right of dispensation.

"*M. Emmery* replies that the majority of the Committee does not deny the right of Government to grant dispensations, but it considers that the law as to prohibitions ought to remain in the state in which it now is, in order not to introduce any inquietude and disfavour as to marriages actually contracted amongst individuals to whom the prohibitions would extend. The majority, however, thought that a marriage between aunt and nephew ought to be forbidden, because, as the aunt to some extent supplies the place of a mother, it would be difficult to reconcile the respect which a nephew owes to his aunt with the respect which an aunt would owe to the nephew, if he became her husband. The same reason does not apply to the uncle and niece. There is no reason for forbidding marriages between brothers and sisters-in-law ; and even the interests of children require that these unions should be permitted ; for children would find in the brother or sister of their father or mother the care and affection of their own parent. As to the necessity which has been alleged of preventing the effects of too familiar an intimacy, the same argument would forbid marriages between cousins.

"The *Consul Cambacérés* observes, that although the Committee found their proposal on the inconvenience which would result from altering the present state of the law, they depart from their own principle by forbidding marriages between nephew and aunt.

"*M. Boulay* observes, that under particular circumstances marriages between brothers and sisters-in-law might be justified, but to allow them generally would be to introduce discord into families, and to create an interest in such relatives to encourage the divorce of their brothers or sisters.

"*M. Cretet* remarks, that the question of dispensations has not been sufficiently examined. Dispensations would become a mere empty form, if the law did not determine the cases in which they might be obtained ; otherwise they would soon become the rule instead of the exception. The law ought to prohibit absolutely that which is injurious, and to leave individuals to act according to their discretion in that which is not so.

"*M. Réal* states that the majority only consented to the prohibition of marriage between aunts and nephews on the condition of dispensations being allowed. The Prussian Code limits this

prohibition to the case of aunts who are older than their nephews, and even then it allows of dispensations. He admits that prohibitions had not been introduced by the Church; but it could not be denied that her ministers had readily availed themselves of them, and had acquired in them a species of property, from which they had excluded the Civil power, and over which even now they claim to rule without any interference.

"*M. Boulay* says, that prohibitions and dispensations are so completely Civil institutions, that Claudius was compelled to obtain a decree from the senate to marry his niece Agrippina. Historians have observed that this example was not followed.

"*The Consul Cambacérés* observes, that the main question is as to marriages between brothers and sisters-in-law, and the point to determine is, whether it is more inconvenient to include them in the prohibition, or to leave them in the limits marked out by the existing law.

"The marriages which may have been contracted under the law of 1792 formed no obstacle to extending the prohibition; there was no reason for fearing that they would be looked on with an evil eye; every one knows that the law is never retrospective; and for this reason it always speaks in the future tense. What has been said as to the interests of children who find a second mother in their aunt, is only true of a very few cases; motives of a much less respectable character usually lead to these marriages; and, in a country which allows of divorce, it is to be feared that the possibility of terminating an existing marriage, joined to the power of intermarrying, may lead to improper connexions between brothers and sisters-in-law, and destroy the peace of families. At the utmost, such relations should not be allowed to marry unless the marriage has been dissolved by the death of one of the parties; there could be no greater scandal than to allow them to free themselves by divorce, in order to rush into the arms of their brother or sister-in-law. Besides, by the use of dispensations, all the inconveniences of prohibitions vanish. At all events, if the feeling is against absolute prohibition, the cases in which it was allowable should be specified.

"*The Minister of Justice* states, that the facilities given by the law of 1792 to brothers and sisters-in-law had, in fact, introduced dissension into families, and was the principal motive for the applications for divorce to the law tribunals.

"*M. Berlier* admits the prohibition of marriage between brothers and sisters-in-law where the first marriage has been

dissolved by divorce; but thinks the prohibition should not be carried further. He objects to the subsidiary arm of dispensations; it is well known that formerly they were a mere formality, and could be obtained by every one who was able to pay for them. He did not doubt that the present Government would be able to diminish the abuses as to dispensations; but in matters which relate to public morality there can be no compromise. Therefore, marriages should be allowed between brothers and sisters-in-law, if usage is not opposed to them; in which case they ought to be forbidden, without allowing either exceptions or dispensations. M. Berlier votes for the absolute permission, and rejects any thing exceptional or founded on dispensations. What would be the ostensible ground for such dispensations? As in former times pregnancy would be alleged, and then the permission would be granted; but such a reason would encourage laxity of morals, as an illicit commerce would thus become the means of obtaining dispensations. Now it would be much better that the law should openly allow a thing not essentially wrong, than say public morality forbids it, and at the same time place alongside of the injunction a legal method of violating it. This is the latest view taken by the law, and it is sound.

"*M. Tronchet* observes, that sound morals require the prohibition of marriage between brothers and sisters-in-law, in order to prevent the inconveniences arising out of close domestic relations; but nevertheless he only adopts this view on the condition of dispensations being allowed; otherwise he should prefer these marriages being allowed generally.

"*M. Maleville* states, that all the Judges are opposed to this species of marriage.

"*The First Consul* sums up the different propositions, and puts them to the vote.

"The Council resolves —

"1. Marriages between brothers and sisters-in-law shall be prohibited.

"2. No dispensation shall be allowed for such marriages.

"3. Marriages between uncles and nieces shall be prohibited.

"4. Dispensations for such marriages may be granted.

"5. Marriages between aunts and nephews shall be prohibited.

"6. Dispensations for such marriages may be granted."

In order to understand this discussion thoroughly, it should be recollected that the Convention had introduced a law in

1792, giving permission for brothers and sisters-in-law to marry, and had at the same time conferred on married couples the largest and almost uncontrollable powers of divorce.

The character displayed by Napoleon in this discussion is very remarkable. On a general subject, whereon every man of the world must have an opinion, and on which the opportunity to talk by a chattering chairman would have been irresistible, we find perfect silence maintained; but at the close the whole discussion was summed up by him, and brought to a close by four beautifully concise propositions.

In the following discussion on the subject of Adoption we find Napoleon taking a more active part; and his speeches on the question afford a good specimen of his legal argumentation: —

“ On the 2nd Germinal, An. XI. (March, 1803), *M. Berlier*, on the part of the Committee of Legislation, presented a draft law to the Council of State, the principal provisions of which were to allow adoption by married people who were childless, and who had been married ten years, or who were past fifty years of age.

“ *M. Berlier* stated that this draft appeared to the Committee of Legislation to embrace the views which prevailed at the previous discussions on this question at the sittings of the 6th, 14th, and 16th Frimaire, and 4 Nivose.

“ But an additional duty devolved on the Committee. At the sitting of the 20th of this month, the *Consul Cambacérés* charged the Committee to inquire whether, after the discussions which had taken place, it seemed more expedient to maintain the right of adoption or to abolish it altogether.

“ *M. Berlier* on this point gives the views of the Committee.

“ Many of the members combated the principle itself, because they thought that every kind of adoption was not only embarrassing in its details, and little in harmony with the manners of the day, but also useless in fact, from the facility which exists for providing by other means for a favourite child, which facility, already very great under the law of Germinal, An. VIII. on Donations, would probably be much extended by the New Code; these views therefore led them to reject adoption.

“ Other members, without participating in this opinion, on the principle of the law, and thinking that there was a great difference

between adoption and the means pointed out for supplying its place, were nevertheless struck by other considerations connected with some portions of the draft law.

"First, it appeared to them that the introduction of the adopted child into the family of the adopter, thus making all the relations of the latter relations of the child without their formal or even tacit consent, was little suited to modern ideas and manners; the fiction, extended to other than the contracting parties, is carried too far.

"An objection not less grave to the draft which has been proposed, applies to the mode in which the adoption is to be effected.

"If a civil institution is in question, why, it is asked, should high political authorities intervene for each adoption? Why is the Legislature, and not (as in Prussia) a Court of Justice, to decide upon adoption?"

[We omit some other reasons which induced the Committee to reject the institution of adoption altogether.]

"*The First Consul* asked what were the views of the Judges on the question.

"*M. Berlier* replies that adoption not having been proposed in the original draft of the Civil Code, the Supreme Courts had had no opportunity of expressing their opinion on this institution. They have, therefore, confined themselves to asking for a law that should regulate the condition of individuals who had been adopted on the faith of decrees.

"*M. Tronchet* did not think that the principle of adoption had ever been decreed; but added that humanity required the maintenance of adoptions which had been made *bonâ fide* in expectation of a forthcoming law.

"*M. Berlier*, to prove that the principle of adoption had been decreed, produces a series of acts which had issued on the subject."

[He then quoted several acts of the Legislature since 1792, recognising adoption.]

"To these positive acts of legislation must be added all the draft codes for the last ten years, except the last.

"*The First Consul* observes that the transmission of name being the principal effect of adoption, it ought to be considered principally under this view.

"He asks, what were the rules of the old law upon this subject.

"*M. Treilhard* observes that names constitute a family property; that they cannot be changed arbitrarily without introducing great confusion into society; that an authority by the Legislature was

necessary to justify a change of name; that occasionally a benefit to the donee was made conditional on taking the name of the donor; that even in this case the sanction of Government was necessary to warrant the change; but then letters patent were to be obtained without difficulty.

"*M. Regnaud* recalls to mind, that the principles of adoption have been admitted at the first discussion.

"All that now remained was to determine between three questions of form: one view proposed that adoptions should only be made by a *senatus consultum*; another proposed an act of the Legislature; a third suggested a decision of the tribunals. Possibly the last method, as the most simple, was the best; but the Council appeared inclined to the second. Now, amongst the reasons which to-day induce the Committee to propose to reject adoption, one of the principal is, that it would lead to much embarrassment and difficulty if adoption could only be effected by an act of the Legislature.

"Therefore, the question now is to determine, whether the discussion shall be reopened on the principle itself, or only on the mode of carrying it into execution; if, in short, they should confine themselves to examine which of the two forms was preferable, an application to the Legislature, or to Courts of Justice. The latter would certainly be more simple and expeditious, and less expensive.

"*M. Boulay* remarks, that adoption is foreign to our manners, and this consideration had principally led the Committee to propose its rejection.

"*M. Réal* states, that the Committee had rather rejected the draft which had been submitted to it than the institution itself, but in attempting to frame a law upon it, the Committee had experienced great difficulties.

"*M. Bigot-Préameneu* says, that the mode of adoption was not the only, nor even the principal reason for the opinion formed by the Committee; for himself, he had been always opposed to adoption both in respect of the difficulties it induced as to successions, and of what he deemed its immoral tendency; in fact, it places a child between fortune on one side, and its natural parents on the other. There are, however, other ways of conferring benefits without requiring from the object of them the sacrifice of his duties and his feelings towards his own family. Moreover, an adopting father will never find in the child he adopts the devotion and tenderness which a man has the right to expect from his own child.

"*M. Regnaud* replies, that it is true adoption presents certain difficulties, but they are not insurmountable.

"He denies that it is followed by the immoral consequences attributed to it; for, far from obliging the adopted child to give up the affection due to his own parent, adoption enables him to relieve that parent in distress.

"*The First Consul* observes, that opinions are still too much divided to enable them to discuss the terms of the law; that as things stood the discussion should bear on the principle.

"The proposed system of adoption was perhaps too complicated: there was no opposition to a simpler system; but to reject adoption altogether was to leave too great a gap in the civil law.

"It has been objected, that it is impossible to dispose of the person of a citizen without his consent, and a minor is incapable of giving his consent.

"But there is no reason why the consent given by a minor should be more than provisional; but the minor preserves the right of refusing or accepting the adoption when he comes of age, and let the judgment which changes his status be deferred to that period; let this judgment only affect the transmission of name, and then it becomes unnecessary to sanction the adoption by any act of the Legislature, the authority of the tribunals is sufficient.

"*M. Tronchet* states, that he had always been opposed to adoption.

"He sums up the reasons for this opinion.

"At the first glance, adoption pleases the imagination and the affections; but in reality it is a species of fraud on the law which limits the power of bequeathing.

"In this view it is in fact illogical.

"This institution, moreover, is neither necessary, nor even useful; it has no other operation than to flatter the vanity of those who wish to perpetuate their names.

"But it is necessary to develop these ideas.

"Is adoption necessary?

"To decide this question, *M. Tronchet* examines what are the advantages, what the inconveniences of adoption.

"The advantages attributed to adoption are, that by the appearance of paternity, it consoles those who are deprived of the blessing of children.

"But adoption will never be anything but a very imperfect imitation of nature.

"Besides, it destroys the affections which create the connection,

by destroying independence, and substituting duties. Man is naturally opposed to all compulsion, he wishes to remain free, even in the actions which are inspired by his feelings.

"*M. Tronchet* proceeds to the inconveniences of adoption. He sees them in respect both to individuals and to society.

"The individuals amongst whom adoption will take place, will often be disappointed in their expectations.

"The father who determines on adopting a child, will more frequently be influenced by dislike to his heirs than by love for the child.

"The father, besides, will often lay up for himself a subject for regret, the more bitter for being wholly without remedy. A married couple have no children; they find one that pleases them, and they adopt it. One of them afterwards dies; the survivor remains, and has children; it is easy to conceive the regret that must ensue at having given a brother to one's own child. We see in this, how far adoption is from imitating nature. Dislike will grow up between the father and the adopted child; between the latter and the natural children; hence discord and trouble throughout the family. Adoption takes place largely in the country, and it succeeds. Why? because it does not bind either the adopted or the adoptor, because each remains entirely free. The father knows that if the gratitude of the son ceases, the benefit may cease also; the son knows that the father is not bound, and the recollection of this keeps him to his duty.

"Besides, adoption is not necessary for the man who wishes to provide for a child.

"The testamentary power, which is about to be enlarged, is sufficient for him. If he wishes for more, he is actuated only by the vanity of desiring to perpetuate his name, and of leaving to the child who is to bear it a large fortune in order to support the name with splendour. Such vanity is only permissible under an aristocratic régime.

"With respect to adopted children, the risks which they encounter are not less.

"In the first place, the subsequent repentance of the father makes this very adoption, which the Legislature intended for children's benefit, an undoubted evil to them.

"Secondly, if the adoption is irrevocable, the child finds itself bound by a tie to which it has not consented, and which possibly becomes burdensome. If, on the other hand, the child on coming of age may throw off a yoke that has been found oppressive, the

original family must be sought out, and what would he find there? distress; for of course his return could not have any retrospective effect on the partitions and other arrangements of property which had taken place among his brethren.

“So much for individuals: but on public grounds the evils of adoption are equally grave.

“Is the adopted child to have no rights except to the estate of the adoptor? If so, the child is a sore of monstrosity in society; he is cut off from his own family, and yet does not belong to the family of his adoptor.

“Is he to have all the rights of legitimate children? If so, the Legislature is both unjust to the relatives of the adopting father, and more liberal than it has any right to be; for it is not competent to them to deprive individuals of their rights of succession, which, so far as they extend, constitute actual property within the limits which they cover.

“*The First Consul* observes, that so far from adoption being the consequence of a system where nobility prevails, it has been in republics that it has chiefly flourished.

“Besides, the modifications proposed place it in harmony with the order of things which had been long prevalent in France. It is nothing but a simple transmission of name and fortune; a transmission which has frequently occurred at all times; and which has never been accused of transforming the adopted child into a monstrosity.

“Adoption also has always existed in the provinces; with this distinction, however, that by law it did not transmit the name of the adopting father of the child, but in fact the name was acquired by the adopted child because no one contested it.

“Adoption, it has been said, only feeds vanity.

“It has more substantial advantages: it is useful in preparing for old age support and attentions more to be relied on than can be expected from distant relations; it is useful to the childless merchant and manufacturer in creating for him an assistant and a successor.

“The power of bequeathing does not create the same ties during the life of the testator; after his death, it does not transmit his name. Nevertheless feelings more noble than vanity,—such as affection, esteem, sentiment,—may prompt a man to create this sort of connection with one whom he may deem worthy of it. It makes no alteration in our manners, as it is confined to regulating the right which already exists of conferring one's name on another; it

stimulates old age to educate youth, and at the same time encourages the latter ; it forms good citizens for the state ; it is a necessary institution for the professions.

"The objections against the adoption of minors fall to the ground, because it is proposed that only majors should be adopted.

"The adoption of majors is only startling in the cases where the adopted child has not been educated by the adoptor.

"The possible regrets of the adopting father have been alluded to ; but repentance is a possible consequence of every human action.

"We may repent a sale, a gift, or marriage. At all events, there is no resource in adoption for the adopting father ; he may cut down the adopted child to its legitism.

"The only objection, then, to adoption is the disappointment of relatives.

"But this effect cannot be ranked in the list of evils ; the interest of collaterals is null ; and indeed, on close calculation, it is rather favoured by adoption than by a simple gift of the whole estate ; for the identity of name establishes relations between them and the adopted, which under certain circumstances may turn out advantageous to them.

"*M. Treilhard* says, that adoption would have lost much of its usefulness if it had been necessary to have it performed by an act of the Legislature. In fact, the Legislature is not always sitting ; it is absorbed by public questions ; it is not every citizen who can make himself heard there. But as adoption is not to take place except in the case of majors, the intervention of the Legislature becomes useless ; there is no longer any need for such a guarantee ; the authority of the Courts of Justice will be all that is required. They will take care that all the necessary consents have been obtained, and that the prescribed forms have been observed.

"It would also be easy to allow the Executive sanction to acts of adoption. It is equally accessible with the Tribunals ; it is never absent, and it is easy for it to obtain information ; but in this case it would be necessary that it should possess the right of refusing its sanction.

"In this mode, and under the modifications that have been proposed, adoption would be useful, were it only to console by its semblance to paternity those who are childless.

"There is no real inconvenience in what is alleged as to its excluding the benefits which a father might wish to confer on his natural children. In fact, if the children are acknowledged, they can

not be adopted; if they are not acknowledged, their origin is doubtful; why then should the author of their days be prevented from repairing in some sort the evil of their birth?

"*The Consul Cambacérés* remarks, that the difficulties in the subject arose from the scheme which was originally proposed. But now that this scheme has been modified, the difficulties vanish. In reality, according to the views developed by the First Consul, adoption would be nothing more than a legal method of transmitting a name and estate: from which it follows that it would have a close connection with the power of bequeathing.

"*M. Tronchet* points out that the opinion of the last speaker is bound up with the question, whether the law should allow a man who has no lineal heirs to will away his estate absolutely. It would seem necessary, then, to adjourn the question of adoption until this previous point had been determined. The right of inheritance is founded, no doubt, on positive law; but the law ought to make a distinction in the order indicated by natural affections. The first step, without question, is to children; nevertheless nature also speaks in behalf of brothers and sisters,—in behalf of nephews, who are also a species of children. It would not be amiss then in the law, guiding itself by nature, to limit the power of disinheriting such near relations as these. These principles have always been received in France: they formed the basis of the system *des propres*.¹ This system should not be regretted, eternal source, as it was, of litigation on the legal title of property; but we might substitute for it the obligation to reserve a portion of the property for collaterals in the first degree. But all these questions are still under discussion, which also shows that the time has not arrived for deciding on adoption. Possibly this institution may be admissible with the modifications suggested.

"*The First Consul* observes, that the happiest effects of adoption are to give children to the childless, a father to orphans, and to bind up infancy with old age and maturity.

"Such being its effects, adoption belongs rather to the law of persons, than to legislation on property.

"It may well be that adoption should only be allowed under certain conditions; for example, that it should only take place in cases where services have been rendered and received.

"Thus, the care bestowed by an individual on a child of tender

¹ We must confess our ignorance of this term of French art.

age, would enable him to adopt it. Services received from one of adult age, might confer the same faculty. Moreover, it would be absurd to allow of the adoption of a major, if it were not founded on motives of gratitude."

After this discussion, the draft was sent back to the Committee of Legislation to prepare another draft in conformity with the views emitted at this discussion.

Much subsequent discussion took place; the Tribunal differed on points of detail from the Council of State, who, however, adhered to their views; and the following Article, forming 343. of the present Code, was finally adopted: —

"L'adoption n'est permise qu'aux personnes de l'un ou de l'autre sexe, âgées de plus de cinquante ans, qui n'auront à l'époque de l'adoption, ni enfans, ni descendans légitimes, et qui auront au moins quinze ans de plus que les individus qu'elles se proposent d'adopter."

Napoleon's views will be found carried out in the above Article, and in Articles 345, 346, and 347.; nevertheless, experience has fully shown that the arguments of those who opposed the institution as unconformable to the manners of the day, were the most sound; for French writers observe that the law on the subject has remained chiefly a dead letter.

By discussions such as these, and by daily sittings — for, in 1802, Napoleon caused a Committee from the Tribunal, and the Committee of Legislation, to meet every day at the house of Cambacérès—in little more than two years from the Code being laid before the Council of State; namely, on the 5th March, 1803, the First Consul was able to present that body of law to the nation, which, under the various names of Code Civil, Code Napoleon, and Code Français, has been the law of the nation ever since. The other Codes followed in due succession. The Code de Procédure, which was principally the work of Cambacérès, appeared in 1806; the Code de Commerce, 1807; and the Code Penal and Code d'Instruction Criminelle at subsequent periods; and the work is still in operation, the Code Forestier having appeared

in 1827, which is the latest date of which we have any new Code, though possibly more have appeared.

On taking a close inspection of the qualities brought to the task by the French lawyers, to whom Napoleon's Codes are chiefly due, we are struck by two facts; 1st, the advanced age of these Law Reformers; 2nd, their strongly marked conservative opinions.

With the exception of Cambacérés, all the others were well passed fifty years of age; the venerable Tronchet was seventy-five years old, when the Discussions in the Council commenced. It would seem that while for the more brilliant achievements of genius, for the production of an epic poem, or a glittering career of conquest, extreme youth may suffice (Condé won the battle of Rocroi at nineteen, Alexander died at thirty-three); the more sober business of legislation requires at least half a century of experience in the world's ways.

So also a strong tinge of conservatism was probably essential when the laws and customs of twenty centuries had to be moulded into form, especially after the rude and reckless innovations which the Reformers of the Convention had introduced. The great principles of human nature remain exactly the same as when rules for conduct were delivered by Moses and Manu, by Minos and Mahomed; and it is vain to expect any brilliant discovery by which crime may be averted through some nostrum of moral vaccination, and virtue established, as it were, by patent.

Of all the lawyers who contributed to the confection of Napoleon's Code, the most distinguished place undoubtedly belongs to CAMBACÉRÉS. The English reader has been so accustomed to hear this name associated with ridiculous stories founded on his gourmandism and vanity, that it is difficult to attribute it to a great legislator and undoubted benefactor to mankind. Certainly it must have been a ludicrous sight to see the little man in full court dress, and covered with orders, vibrating in his daily walks in the Palais Royal, and attended by his two satellites, who duly laughed at his good jokes and ate his good dinners. It must have been more ludicrous still to observe him at his weekly

receptions, when, in the absence of Napoleon, he did the honours of the empire; and, as Prince of Parma and Arch-Chancellor, he strutted through his brilliant *salons* preceded by two gentlemen of the chamber in court dresses, with gold chains round their necks, and all that was distinguished in Paris standing up in his presence. His remark to an old friend of a more simple *régime* paints his social character to the life:—"devant le monde appelez moi *votre Altesse*, et dans l'intimité *seulement Monseigneur*." The joke told of him by Bourrienne, also, is so good that it may bear repeating. The Council on one occasion sitting till very late on some important business, Napoleon observed that his Imperial Chancellor was becoming extremely agitated and uneasy, and at last, that he seized a piece of paper on which to write down his ideas: Napoleon, who, by the bye, never attained the nice conduct of a gentleman, snatched the paper out of his hand as soon as it was written, and found that it was a note to Cambacérés' cook, with this important dispatch, "*Gardez les rôtis, les entremets sont perdus*;"—the point of which becomes more intelligible to the English reader when he recollects that at French dinners the side dishes present themselves at the first course, the *rôti* at the second.

Such foibles, however, as we have been alluding to, were merely on the surface; they were compatible with profound knowledge of the world, great learning, indefatigable powers of application, and administrative talents of the highest order.

We have already seen that the first draft of the Code Civil in 1794 emanated from him; and from that period till its appearance ten years afterwards, his labours upon it must have been incessant. With justice, then, does his biographer, M. Durozoir, attribute to him the chief merit of the Code Civil, and, in addition, the excellent judicial organisation which followed it.¹ Cambacérés, indeed, appears to us to be the type of that most useful class of men, so much needed by Government, so little appreciated by the public,—faithful administrators. Without zeal, without enthusiasm, without any strongly formed opinions, he had all the talents

¹ La Biographie Universelle, Supplément, ad voc.

and the principles which enabled him to render inestimable service to the State which employed him. He never withheld the honest expression of his opinion, even from the impetuous Napoleon, however unpalatable he might know it would prove; but having done so, and contrary views to his own prevailing in Council, he performed his duty in carrying them into execution with as much energy and good grace as if they had been his own. He died in 1824, of apoplexy, aged sixty-seven, leaving an immense fortune.

M. PORTALIS probably holds the next place, both from the amount of labour bestowed by him, and the extent to which his opinions prevailed, in the preparation of the Code. Born in 1741, and of strong Conservative opinions, it was his lot as a barrister, before the Revolution broke out, to be pitted against two celebrated literary men, who each conducted their own suits,—Beaumarchais and Mirabeau. Men of talents such as these, and unscrupulous in the use of them, as we know the author of *Figaro* and the revolutionary demagogue to have been, are not exactly the opponents that a steady-going barrister would willingly encounter; but Portalis appears to have escaped unhurt in either passage at arms, and, indeed, to have completely worsted the brilliant Mirabeau by his forensic tact. With Beaumarchais—whose attacks on Judge Goëzman, the Parliament, the witnesses arrayed against him, had arrayed all the laughers of France, and they form the nation, on his side,—we do not find in that most amusing volume of this author's works, which contains a report of the suit, that any attempt is made to involve Portalis, who was counsel against him, in his unsparing invectives and ridicule, otherwise universal. In the Council of State, Portalis was the strenuous defender of the Roman law against the advocates of local usages, and he attacked unsparingly the innovations admitting of divorce and adoption which had been introduced by the Convention. The "*Discours Préliminaire*," which appeared to the Code Civil, and which has been much admired, also emanated from Portalis.

The venerable TRONCHET, whom Mirabeau used to call the Nestor of the aristocracy, also rendered invaluable services

to the formation of the Code. Born in 1726, his practice as an advocate seems chiefly to have been confined to Chamber Counsel; but his authority as a jurist ranked most justly high, as we have good ground for ascertaining by his pithy remarks during the two years' discussions in the Conseil d'Etat, of which he was a most assiduous attendant.

Two other distinguished barristers, MM. BIGOT-PREAMENEU and MALEVILLE, complete the group of leading jurists whom we may look upon as the chief authors of the Code. M. Bigot, like his colleagues, was far from belonging to the movement party; and Napoleon afterwards selected him for his Minister of Religion, chiefly, as he himself confessed, on account of his name! M. Maleville, whom accident places last in our list, was also a most active and useful *collaboreur* in this work of legislation. He published a valuable work on the discussions which took place in the Council, which is considered standard, but which unfortunately, we have not seen.¹

We have left ourselves but little space to point the moral which we desire to draw from the above sketch. Are there in England materials—men—the strong Governmental will—which are requisite for producing a great legal monument such as the genius of Napoleon knew how to erect? It is impossible to avoid perceiving that France possessed certain great advantages when she commenced upon the task of consolidating and systematising her law. The two great evils that oppressed her consisted, as we have perceived, in the conflict of laws, and the conflict of jurisdictions, which prevailed throughout the country; but the latter of these evils was at once extirpated by the Revolution, which flung to the winds every remaining vestige of Feudalism. So with respect to the Substantive Law, directly an authority arose with sufficient power to decide between two contesting systems, abundant materials existed ready to the hand of the legislator, on which codification might proceed. The Roman law being the basis of the civil system, both in the *pays cou-*

¹ Analyse raisonnée de la Discussion du Code Civil au Conseil d'Etat, 4 vols. 8vo. Paris, 1804-5.

tumier and in the *pays de droit écrit*, the reformers of the Revolution had within their reach the whole of the systematic and institutional writers of the Continent on the Corpus Juris, from whom orders, arrangements, divisions, and definitions were deducible at will. Pothier's works alone formed a storehouse, from which a great portion of the French Code was furnished forth. Moreover, the difficulty which is now pressing on the English public, arising from the want of a simple and uniform system of procedure, was not at all felt in France. Louis XIV., so long back as 1667, had succeeded in introducing an Ordonnance, which established uniform procedure throughout the kingdom. This procedure, though in our view defective in several particulars, was nevertheless framed on scientific principles by the ablest magistrates of that period, and it is described by M. Carré, whose work we have placed at the head of this Article, as "le résultat de la science, et de la méditation la plus profonde." The Code of Procedure, framed by Cambacérés, follows the Ordonnance almost servilely, and all the great peculiarities of French civil law proceedings,—the judge-reporter, to whom, on a *curia advisari vult*, the cause is referred, the judge-advocate, or Ministère Publique, the strong bias against *vivâ voce* evidence, the reference of commercial disputes to a lay tribunal, of domestic disputes to a family council,—all hold their place in the new Code as firmly as in the old practice. Our own system, on the other hand, with a richer repertory of Jurisprudence, as Bentham himself confesses, than the law literature of any other country contains, is nevertheless a rude and indigested mass of wealth, as to which almost the only arrangement ever applied has been alphabetical and mechanic.

Again, we are equally to seek in England for a set of Tribonians. Our Judges, it is true, are sufficiently well endowed in years and conservatism to fit them for the task; but we have heard of late, on very high authority, and we know of the fact *aliunde*, that the greater portion of them cannot bring themselves to the contemplation of a reforming besom with any equanimity. Our leading advocates, on the other hand, are so engrossed with professional business, they

are moreover, from the division of labour which of years has prevailed, so cut up into sections, that the unable, and become gradually unfitted, to apply the comprehensive views which are required from the legis-
The fact cannot be denied that our system produces what in French we call *specialités*; the result may be that we boast of greater perfection in the class Advocate, as compared with the class Judge, than our neighbours; but it is possible that it is compatible with these special excellences to find the development of that order of faculties in which the tendency is predominant to regard particulars only in subordination to the whole.

Nevertheless there is ground for hope. Unless we are much mistaken, an order of men is springing up in England from whom great services to the commonwealth in systematising and organising our law, may be hereafter obtained.

The County Court Judges, by being withdrawn from grossing professional labours at an earlier period of life than their superior brethren in the ermine, will run less risk of having

“ Their nature

Subdued to what it works in, like the dyer's hand :”

and, moreover, from having a wider opportunity, and perhaps more active motives, to take larger generalising views of the judicial office, and of the benefits it is capable of rendering to suitors, than any professional class which has hitherto existed in England, — may probably supply, at no distant epoch, a body of practical jurists to whom the great work of systematic reform may be safely confided. Nor even now do we want that instruments are wanting to commence this great work. One name will immediately occur to all the readers of the *Law Journal*, to all who have watched the progress of Law Reform since the delivery of the great speech on the subject in the House of Commons, in 1828, by HENRY BROUGHAM. We gladly would we see the clear mind of LORD LYNDHURST engaged in such a work. The LORD CHIEF JUSTICE of ENGLAND, also, if he could be spared from the duties of his administration, would be able, with his mastery of the common Law, to render more service probably than any other man in the empire in stripping bare *antiqui juris fabulas*, and

ing for us the substance of the good old Teutonic system, under which our country has flourished. LORD CRANWORTH would supply not only good Law and Equity, but sound reason. May we also take the liberty of mentioning Mr. JUSTICE ERLE, whose practical good sense, and sturdy adhesion to the ends of justice, are always so conspicuously shown when the technical hair-splittings of an obsolete system are brought before the tribunals? Other names too occur to us in abundance: LORD DENMAN, whose powerful intellect is bright as ever; Mr. PEMBERTON LEIGH, whom, though ambition might not stimulate, the love of country might persuade, to give to it his labours; SIR EDWARD SUGDEN, thoroughly master of one department; and one or two others, whose valuable labours in the Indian Law Commission and Legislative Council are not so well known in this country as they deserve. Nor is it fair to omit, even in this Review, a reference to the LAW AMENDMENT SOCIETY, the list of whose active members would well furnish much useful help.

But where is the strong government, the "particle of divine spirit," to organise such a Commission as we have been foreshadowing? Here at length we arrive at a chasm which we feel unable to bridge over. Unfortunately, in the present day, the business of Government has become so absorbing, the empire over which our ministers have to extend their vigilance is so extensive, that the head of every department is completely engrossed by the current details of the day. It is not the function of this Journal to intermeddle with the party politics before our eyes, to point out the shortcomings of the one leader, or to herald the promises of another; but steadily keeping our eyes on one great object,—the improvement of the Laws of England,—to which for many years our energies have been directed, we assert that the expression of the wish of the people in this matter will be sufficient to enable any Minister to take the necessary steps for accomplishing this great work. And this, at all events, is certain, that the Minister or Government, who may undertake this duty, will gain possession of a field in which indeed a champion is required, and where undying honour awaits the victor.

ART. II. — NATIONAL INTERVENTION.¹

IN assigning a title to this Article, we have intentionally abstained from giving the subject of which it treats the denomination adopted by some of the latest writers on the Law of Nations, such as Professor Heffter, of the University of Berlin, in 1844; and Dr. Wheaton, in the last edition of his "Elements du Droit International," published at Leipzig in 1848, namely, the "Right of Intervention;" for we have conceived no such primitive or primary absolute right of intervention exists among sovereign independent nations. It may be worth while shortly to inquire whether there is any ground for recognising such a right of intervention; first, in point of legal or juridical principle; secondly, in point of usage and traditional authority; thirdly, in point of general expediency.

First, then, such a pretended original or primitive positive right of intervention will be found, upon inquiry, to be inconsistent with the fundamental principles of the Law of Sovereign States as universally recognised. In general, no such right of intervention can exist with regard to matters which it belongs to each state to arrange in accordance with its freedom and independence; namely, the constitution and administration of its internal government. No state can legally impose upon another any particular constitution, nor promote or oppose changes therein, or exercise any legislative, executive, or judicial power, civil or criminal. As little can any state exercise over another any external sovereignty. And the principle of non-intervention is thus manifestly a *general* rule, and intervention merely the exception.

The chief primary or original, and absolute or unconditional, rights of sovereign states are self-preservation and independence; legislative, executive, and judicial powers

¹ This Article should be taken in connection with the previous Article on International Law. They have recently been reprinted in a compact form, and published by Blackwood. We have much pleasure and pleasure in stating the name of the Author, James Reddie, Esq., of Glasgow, Advocate, a name well known to all inquirers on International Law. — Ed.

and criminal ; right of progress or advancement, and of promoting its own prosperity, consistently with the similar right of other nations, and involving equality in point of right ; right of territory and property ; right of binding by treaty ; right of defence by war. But the right of intervention cannot be ranked in the same order or placed in the same class with these rights. It falls under the right of self-preservation and defence. It can be justified only, upon legal grounds, by such previous acts of aggression on the part of other states, or such aggrandisement of other states, through conquest or succession, as actually to endanger the safety of the neighbouring state, and to warrant what has been denominated in Modern Europe, the Maintenance of the Balance of Power among the nations of this quarter of the globe. It does not appear that intervention can be legalised by the mere increase of the wealth or population of a country, or by its sending out a portion of its population to other parts of the globe, and forming colonies ; for colonies frequently weaken as much as strengthen the mother country ; and in their natural progress, colonies seem entitled and destined, ultimately, to detach themselves from the parent state, and to obtain self-government.

In the second place, with regard to usages or traditional authority, it is plain that mere aggressive acts can never be rendered legal by continued repetition for any period, however long. There can be no prescription of criminal acts of violence. And non-intervention being obviously, in point of principle, the general rule of international law applicable to sovereign independent states, and intervention merely the exception, it accordingly appears that the earlier modern writers on the Law of Nations, such as Grotius, Pufendorff, and Rachelius, have not specially or expressly recognised any such primary positive right of intervention. Vattel, indeed, the populariser and improver of Wolff, from the vague and indefinite conception which he seems to have formed of international law in his otherwise excellent work, "*Le Droit des Gens*," includes not only the international law of states, public or constitutional, municipal and private, but also the ethics or morality of nations in relation to each other ; and not distinguishing the marked difference between

the negative virtues of justice and the positive virtues of benevolence and beneficence, inasmuch as the former are susceptible of enforcement by human means, consistently with the common sense and moral feelings of all mankind, and with general or universal expediency, while the latter do not admit of any such enforcement, he seems to follow many preceding jurists in holding the latter of these moral obligations, as well as the former, to be productive of corresponding rights; and he is thus led, or in a manner reduced, to the necessity of dividing rights, like many of his predecessors, into perfect and imperfect, the latter of which cannot be enforced, and are, therefore, no rights at all in a legal or judicial sense. But while Vattel holds it to be the moral or ethical duty of every nation and its government to promote the welfare of other nations, so far as it can consistently with its own welfare and the promotion of its own prosperity, he does not recognise any right of intervention by one or more nations even for alleged beneficial purposes. And Professor Lampredi, of Florence, who, in 1782, published his excellent work, "*Juris Gentium Theoremata*," while he expounds it as a right of nations, if they choose, to carry on commerce with each other, so that they cannot, with certain exceptions, be legally interrupted by other nations, admits that a nation cannot be legally compelled to engage in such commerce unless it chooses. "*Nemo est qui, non potenti, aut venienti et invito per vim, obtundere beneficium*," (Vol. iii. § 3.) Even G. F. de Martens, whose treatise "*Du Droit des Gens*," appeared first in 1788, and the second and third editions in 1801 and 1820, does not expound any such primary absolute right of intervention. Nor did Privy Councillor Schmalz, in 1817, or Klüber, in 1819, particularise any positive right of intervention as existing among the European nations, under permanent and generally binding treaties, or as founded on any long-continued usage of such treaties. That voluminous German writer Moser, 1770—1780; that more acute German jurist Günther, 1787; and likewise Martens, rather bring forward intervention as merely a subordinate negative right, resting on previous acts and events, under the positive and primary right of self-preserva-

tion and defence, and as embracing and warranting such measures as may be calculated to maintain an equilibrium of power among civilised nations, and prevent the aggrandisement of one nation to such an extent as to endanger the safety of others.

On the other hand, the later distinguished international jurists, Professor Heffter and Dr. Wheaton, appear, at first sight, to give to intervention a more prominent position, by devoting an article or section to the right of intervention, as if it were a primary or fundamental right, like self-preservation and independence, not resting on the right of self-defence — when the aggression has been actually made, or on the maintenance of the balance of power among states — when there arise well-founded apprehensions of aggression; but rather as resting on alliances and treaties, general, if not universal; or, on a kind of common law, founded on a continued usage of such treaties. And in the last edition of his *Elements*, published in 1848, in French, Dr. Wheaton, in the second part of his work, devoted to international rights, primitive and absolute, in chapter the first, on the Right of Conservation and Independence, after § 1., on the Rights of Sovereign States with regard to each other; and after § 2., on the Right of Conservation, proceeds, in § 3., to discuss “the *Right of Intervention*,” apparently as falling under this description of primary rights. From this section, § 3., being marked on the margin as treating of the *Droit d’Intervention*, we were apprehensive that this able author intended to elevate what he called a Right of Intervention, from being, as admitted by previous systematic writers on the Law of Nations, a subordinate, conditional, and merely negative right, into a primary, absolute, and positive right, upon the assumption of some French writers, that treaties entered into by the majority of civilised nations are, in particular cases, obligatory on other nations, although not parties to these treaties; or that usage, as constituting Common Consuetudinary Law, may be established by treaties, although afterwards reciprocally departed from, expressly, or *rebus et factis*, by a long series of acts, or reciprocal conduct, observed for ages. But we were happy to find, on proceeding to § 12.,

that this ingenious as well as learned author has not made any such attempt, but hitherto, at least, coincides with us in opinion, that non-intervention is the general rule, and that intervention is merely an exception, founded on absolute necessity; and that in giving a succinct and neat account of the various successive interventions *de facto*, which have taken place among the European nations since the peace of Westphalia, in 1648, he does not found upon them, as introducing a new rule in International Law, or as elevating a subordinate and conditional right into a higher grade and primary position. The following paragraph is so just and happily expressed, that we beg leave to quote it:—

“The occasions on which the Right of Intervention may be exercised to prevent the aggrandisement of any state by innocent and legitimate means, such as those we have just indicated, are rare, and cannot be justified except in the cases in which the augmentation of the military and naval forces of a power may have been such as to inspire just fear in other powers. The interior development of the resources of a country, or the acquisition of colonies distant from Europe, have never been considered as sufficient reasons to justify an intervention. It would seem to have been generally thought that colonies, far from contributing to increase the power of the mother country, rather contributed to weaken it. The increase of the wealth, and of the population of a country, which is beyond doubt one of the most efficacious means of increasing its power, takes place too insensibly to inspire other countries with just or reasonable alarm. To believe that nations have the right of intervening, by force, to prevent the development of civilisation, and to destroy the prosperity of neighbouring nations, is a supposition of which the injustice is so manifest, that it needs no refutation. Intervention to maintain the equilibrium of the powers, has usually for its object to prevent a sovereign already powerful from incorporating conquered provinces into his territory, or augmenting his dominions by marriage, or by succession, or exercising a dictatorial influence over the policy of other independent states.”

After noticing the alliances formed, and the wars under-

taken, to set bounds to the aggrandisement of the House of Austria and Spain, under Charles V., and his son Phillip II., which were terminated by the Peace of Westphalia, and then to the ambitious projects of Louis XIV., which forced the Protestant States of Europe to unite with the House of Austria, and to take part in the English Revolution of 1688, Dr. Wheaton proceeds to enumerate, in § 4., the intervention on the occasion of the wars of the French Revolution; in § 5., the Congress of Aix-la-Chapelle, of Troppau, and of Laybach; and in § 6., the Congress of Vienna. In § 7., omitting altogether any allusion to the intervention of France, Spain, and most of the other Continental nations, in 1780, on the occasion of the dispute and war between Great Britain and her North American colonies, he goes on to notice the intervention on the occasion of the war between Spain and her American colonies. In § 8., he mentions the intervention by Great Britain in the affairs of Portugal in 1826.

In § 9., he records the intervention of the Christian Powers in favour of the Greeks. In § 10., he notices the intervention of the Great Powers of Europe in the internal affairs of the Ottoman Empire in 1830. In § 11., he mentions the intervention of the Five Great Powers in the Revolution of Belgium in 1830.

In § 12., before referred to, Dr. Wheaton thus distinctly expounds the Law of Nations:—"Each state, in its quality of a distinct Moral Being, independent of all other states, may exercise all its sovereign rights, provided that in exercising them it does not hurt or infringe the similar rights of other states. Among these rights is that of establishing, changing, and abolishing the constitution of its government. No foreign state has a right to oppose the exercise of this right, unless this intervention be authorised by some special convention, or by the necessity of preventing events which would compromise its independence and security. Non-intervention is the general rule; and the only exceptions to this rule are founded on absolute necessity."

In § 13., Dr. Wheaton correctly expounds that the

approved usage of nations authorises the proposal by one state of its good offices, or mediation, for the arrangement of the internal dissensions of another state. And, *if this offer of mediation be accepted*, this act *alone* justifies the intervention.

In § 14., Dr. Wheaton further expounds the law, that the political independence of each state embraces not only the form of its government, but also the choice of its supreme magistrate, and subordinate authorities, as regulated by the fundamental laws of the state; and, in § 15., he observes, the only exceptions from these general rules are those which result from Treaties of Alliance, of Quarantine, and of Mediation, to which the state whose affairs are in question is a contracting party, or treaties concluded by other states, in consequence of a supposed or inferred right of intervention, founded on the necessity of their own preservation, or upon an eventual danger threatening the general security of the powers.

Finally, in § 16., Dr. Wheaton observes the treaty of the Quadruple Alliance, concluded among Britain, France, Spain, and Portugal, affords a remarkable example of the questions relative to the succession to the crown in these two latter kingdoms.

From the preceding short review of the first chapter of the second part of the last edition of Dr. Wheaton's "Elements of International Law," in French, we are happy to find that, while we regret he, along with the Berlin Professor Heffter, has given the unqualified appellation of rights to the more recent practice of the European nations of intermeddling with the affairs of other states, Dr. Wheaton, at the same time, so explicitly admits, that non-intervention is the general rule of law, and intervention merely the exception, admissible only when it is justified in cases of free consent, by actual aggression, or by such aggrandisement or combination of individual states, as to afford well-founded dreads of danger and injury in other states, such as to warrant measures of prevention, in order to maintain the balance of power among civilised nations. And this is the more satisfactory to us for several reasons. Dr. Wheaton's "Ele-

ments" are not merely a learned, but also a very able, systematically, and philosophically arranged work, composed in the English and Continental languages, by an American lawyer, consequently well acquainted with English law, and subsequently trained to diplomacy at the Court of Prussia. This work is therefore likely, in future, to be held in estimation as an authority, not only in America and on the Continent of Europe, but also in England, and there to supersede the work of Vattel, which owed the celebrity it obtained in Britain very much to the praises bestowed on it in Parliament by several of the illustrious statesmen of the ages now gone by, and in consequence, perhaps mainly, of the apparent indisposition hitherto of eminent English lawyers to treat scientifically of International Law. And it is, therefore, a satisfaction to us, that in the matter of intervention we have no occasion to differ from so eminent an author as Dr. Wheaton, as we formerly felt ourselves called upon to object to what appeared to us to be an attempt, very ingeniously, but groundlessly, to rear up, for a particular purpose, in support of the armed Neutrality Scheme of the Empress Catherine, a Law of Nations, founded entirely on a number of nearly simultaneous treaties, by a majority, in hostile combination, of the European States, such as to be obligatory on other nations who were in no respect parties to those treaties, or on the assumption of a series of successive treaties, though only by a majority of states, constituting an usage, such as to form a Common Consuetudinary Law of nations, although those treaties had expired, or had been departed from by a series of acts, or conduct, quite inconsistent with any such assumption or inference.

In the third place, as it does not appear from Dr. Wheaton's account of the different interventions recently practised by the European nations, that they have been successful hitherto in establishing better principles of justice, equity, and general expediency than what were previously recognised under the right of defence, and the maintenance of the balance of power, we may now, as proposed, proceed to inquire briefly whether such interventions are likely to be of use, or ought to be attempted, except in cases of urgent

necessity, to prevent a greater social evil. And here, we conceive, we cannot do better than give the observations made in 1847, before the last French Revolution of Feb. 1848, by a gentleman who is, no doubt, a British subject, but was then resident on the banks of the Rhine, and is a calm, impartial, and discerning observer of the passing events of the times.

“ The recent events in Spain, Portugal, and Italy, lead me to wish that some one capable of the task would lay down clearly the law of states, which ought to regulate political interventions, and application of military force, in friendly countries. Such a work, by settling public opinion, might form a check—and almost the only check—on despotic princes, and even on comparatively popular governments, ministers, and statesmen. In the unsettled state of some questions of that kind, we have to dread that the collisions likely to ensue among neighbouring States, interfering each on its own principles, deeply coloured, of course, with its own supposed interests, may lead to a renewal of those great and desolating wars which have, in our times, so long kept down Europe. Now that most of the smaller States have been swallowed up by the greater, there can be no little wars,—no campaigns limited to marching and counter-marching, and the operations of which terminate in the siege or capture of a petty fortress. Even the plan of the General Congress, by which the larger states settle the quarrels of the lesser, is subject to grave objections. No foreign country enters fully into the feelings of another, or is fully aware of its actual situation, or of what is best for it. What foreign state could understand, or intervene, without the greatest mischief, in the party contests of the British nation? What, for instance, if they were generously to undertake to settle Ireland, under pretence that that the country has always been misgoverned by Britain, and that a new system is called for? In general, all armed intervention appears from experience to be mischievous, except for the purpose of *resisting foreign intervention*. Where a portion of a country had separated itself from the rest, and formed a new State, as in the case of the Low Countries, or the United States of

National Intervention

America, the case becomes different, and seems to resolve itself into that of independent nations among each other. So ill do interventions in general succeed, that it seems that no intervention at all is the best rule. Much misery may, no doubt, in this way be permitted, and will ensue among the rival parties within the country, much bloodshed, and cruel proscriptions. But it seems doubtful whether even these are not less pernicious than the ascendancy given to one party under foreign influence,—the stop put to the natural improvement of the country, and the changes introduced into laws and customs; one consequence always being, that the governing power, be it what it may, is invested with sufficient power to put down all sedition, which is often extended to mean all freedom of thought. Foreigners put armies at the command of the prince. The laws that should regulate and restrain the Executive are never thought of, or are left to the tender mercy of an ignorant prince, or of an unprincipled favorite. It is doubtful whether the rigor and fermentation caused even by a civil war is not better than the hasty and forced peace produced by foreign arms, which generally suppose the prostration of all internal and national force and vigour.”

In the truth and justice of these observations we were, at the time, very much induced to acquiesce. But the leisure, which the peaceful reign of Louis Philippe afforded, for such inquiries and discussions, was sadly interrupted by the last violent French Revolution of February 1848; which not only swept away the Constitutional Monarchy, but, in its explosion, kindled the flame of intestine discord and civil war in Berlin, Vienna, and Rome, and threatened to overthrow the fundamental principles of justice, upon which the Social Union depends. The greatly increased facility in travelling by land and sea had recently increased the means of communication and combination among the worthless and mischievous portions of the inhabitants of the different European capitals, and large mercantile and manufacturing towns. The dependent condition of a large portion of the working population of Paris caused them to be easily misled by the absurd and almost insane schemes of Parisian political specu-

lators, equally impracticable as unjust. Highly enthusiastic popular feelings of freedom and independence had for some time prevailed throughout Germany, not merely among the worthless portion of the population, who aimed solely at their own selfish and unjust aggrandisement, but also among a large portion of the middle class of population, who, *bonâ fide*, wished only the removal of grievances, and a moderate constitutional government. The, to foreign nations, apparently excessive excitement and zeal of the Germans generally, in favour of the population of the Duchies connected with Denmark, and their consequent obstinate hostility to the Danes, threatened the integrity of that small kingdom. Finally, the old, and gradually becoming weaker, policy of the Austrian Government, the fluctuating and inconsistent policy of the King of Prussia and his Ministers, the mistaken policy of the King of Sardinia, and the degraded state generally of the Italian population, high and low — all the causes and events now and before alluded to, conspired to spread a political intestine conflagration over the continent of Europe, from which it has not yet, by any means, entirely recovered. France, in 1848, presented a striking spectacle of wickedness and weakness. To put an end to the horrors of civil war and slaughter by the mob of Paris and other large towns, recourse, as usual, was had to the army for protection of life and of property, and to restore order and comparative tranquillity. But, unfortunately, in the Government which came to be established, the Executive and Legislative Powers appear to be opposed to each other in a manner inconsistent alike with steady co-operation or stability. And unfortunately, also, although constructed upon a basis as broad as practicable, the Representation has not hitherto secured a body of men, however intelligent, sufficiently patriotic to sacrifice their selfish individual or party views to the national welfare. In Austria, perhaps, the greater evil was averted by the ultimately weak administration of Metternich being succeeded by at least comparatively able and energetic men, who were enabled to put an end to the miseries and horrors of internal civil war, by the aid of the less civilised nations on the north and east. And

although adverse to any foreign interference whatever, we must do the Emperor Nicolas the justice to admit, that although his alliance and aid in support of Austria of course gratified his ambition and increased his own power, he acted as disinterested a part as could reasonably in the circumstances be expected. The alliance of Austria and Russia appears also, with the support of Great Britain, to have fixed the vacillating policy of Prussia, and secured, in the mean time, the threatened integrity of the small kingdom of Denmark. And this union of these three great Continental Powers, if they were only to abstain from their own aggrandisement, and promote the establishment of moderate constitutional governments, protecting the individual rights and energies of the people, might, perhaps, effectually contribute, not only to the tranquillity, but also to the positive welfare and advancement, of Germany in general. The evil, however, is, that this new combined intervention on the part of Austria, Russia, and Prussia, is by the Despotic Governments, whose more recent proceeding, as well as those of the minor sovereigns of Germany, indicate an intention of measures, of which the result will, probably, be very different from that just alluded to. But Great Britain, Holland, and Belgium, it is trusted, will continue to have, and France and Sardinia, it is to be hoped, will soon be able to construct for themselves, constitutional and truly liberal governments, upon a popular basis, with free institutions, protecting individual rights and interests, and will thereby set and exhibit a salutary example of regulated liberty to the continental nations of the east and north of Europe. For this is almost the only intervention or influence which one nation can legitimately exercise upon or in relation to another. This influence of example is no doubt indirect; but when the national intercourse is frequent or intimate, it is powerful, and operates safely, because gradually. It is more efficient for good than even the generosity of a government which declares its territory a place of refuge and safety for all the unfortunate under political changes,—such as dethroned kings and disappointed ministers. And it is never liable, like it, to the risk of a well-founded reproach; for an indiscriminate and too generous

declaration by a government, that its territory is a safe refuge for all the unfortunate under political changes, may not only relieve and succour the unfortunate innocent, but also afford similar shelter to the guilty who have been unsuccessful in their enterprises,—if not absolutely criminal, at least undertaken solely for their own selfish aggrandisement,—and may thus afford such individuals the means of carrying on, in the midst of a foreign European capital, schemes of mischief which they had not the means of maturing in their own native countries. National pride and generosity are not sufficient, any more than superiority of wealth or power, to excuse, or legally justify, a neutral nation, desirous of peace, in affording the means of political machinations, which is, in fact, equivalent to an actual intervention.

ART. III. — PROGRESS OF LAW REFORM IN SWEDEN.¹

“THE primitive rule for the *ownership of family property* in Sweden was, that it belonged to the husband alone. That rule was certainly long since changed; but full and general justice was not thereby done to Swedish wives. In the cities alone, where all family property was common, *one half* of that common property belonged to the wife, and only *the other half* to the husband. In the counties, on the contrary, where the primitive rule was changed in the twelfth century, and where real property, acquired by what title soever before the marriage, or by title of descent² during the coverture, *one third* only of the common property belonged to the wife, and *two thirds* to the husband. When a family owned property both in a city and in a county, the personal pro-

¹ We now conclude the Letter of Professor Bergfalk to Mr. D. D. Field, of New York, commenced in our last Number, p. 164.

² *Ancestral* property, acquired by title of purchase, was then, and is in part still, considered as being acquired by title of descent.

perty was, of course, subject to the law of the family's head, and the real to the law of the locality where it was situated. But until 1736 a family, wherever it actually resided, was considered as having its home in the country, if its first abode after the marriage was taken up there, or in a city, if its first settlement after the marriage had been in such a place; and when that rule was in general abrogated in the year 1736, care was taken that the nobility should be considered as always residing in a county. On the contrary, it was enacted in 1569, that when a deceased clergyman had left a widow, and in 1736, that when a clergyman's wife died before him, the family's house and the real property acquired by title of purchase during the coverture, should be considered as situated in a city, whatever were the actual site.¹

“As soon as a remodelling of the Civil and General Code was resolved upon in the seventeenth century, the justice and the expediency of the differences just mentioned between places and classes were called in question, 1689. And the same question was moved again in the legislative session 1731. Men were even then found who thought it but just to give *all* Swedish wives what only *some* of them were then entitled to; namely, equal shares with the husbands in the common property; but public opinion was not then prepared for such a change, and the shares of the husbands and the wives were, upon the whole, left as they were.

“The Commissioners, however, who reported the Civil Code in the years 1815—1826, thought the time come at last for advancing one step beyond that made in the twelfth century, and for giving *all* Swedish wives equal shares with the husbands in the common property; and in the year 1845 a law to that effect was passed and approved. The old line of demarcation between the common and the individual family property, as sanctioned by the old law, was left unchanged, but can now, as before, through a contract of marriage, be defined as the parties wish to have it.

“In the same legislative session, 1844—1845, there was

¹ Of course only the general outlines of the system are here given.

also a corresponding change in *the law of successions*. That law also was of old unfavourable to the women. The primitive rule was, that a female relative of a deceased person could not succeed to any part of his property when there was a male person in the same relation of blood to him; and when it was first changed, it was only in the cities that women and men got equal rights. In the counties, where the first change of the primitive rule was effected in the thirteenth century, female relatives of a deceased person got only shares, less by half, than those taken by the males who stood to him in the same relation of blood. The personal property was subject to the law of the home of the deceased, but the real to the law of the place where it was situated. Deceased persons of the nobility were, without regard to their actual residence, considered as having, at the death, had their home in a county; and deceased clergymen and wives of clergymen were, since 1669 and 1736, considered as having at the death had their home in a city, wherever they were then actually residing. The real property of the clergy was also, without regard to the actual site, considered as situated in a city, whenever a question of succession thereto was raised.¹ Even the abolition of those differences was spoken of in 1690 and 1731, although without effect. But since it had been strongly recommended in the reports on the civil part of the Code, 1815—1826, a law to that effect was passed and approved in 1845, so that the rights of men and women now are equal in all successions to property of deceased persons, whenever there is not a lawful will to the contrary.

“ The Swedish farmers were favourable to these two reforms. The nobility, on the contrary, were very active in resisting them, and foretold the most direful consequences therefrom, not only to their own order, but also to the farmers. The cause of the distrust, wherewith these prophecies were met, was in part the experience of some coun-

¹ Other rules of succession would, of course, be established by a will. The power to dispose of property by will is, however, still limited. It was more so in the old time.

ties in the south of Sweden, where the equality now proposed had long since been established without any disastrous consequences.¹ But the reaction party seem, after that defeat, to have made up their minds to avenge the misfortune on the immediate source of the evil. And that is, as I have already remarked, the chief obstacle to immediate reform of the largest department of our law. The anger will, however, subside when it becomes aware of the impossibility of undoing what is done, and the work will ultimately be the easier for what is already obtained.

“ Besides the objections already stated to the Reported Code, there are, however, also others raised.

“ The arguments made use of in ‘ Savigny’s German Treatise,’ on the fitness of our time to legislation, have repeatedly been urged in Sweden; and of late some moderate reaction men, who either doubt the efficiency of the old trite objections, or do not approve of them, have raised another, upon which great stress is now laid.

“ They reproach the Reported Code with being the true cause of the slowness of Law Reform in Sweden. They pity the people for having been so long deprived of the Law Reforms most wanted, and they insinuate that those reforms would all of them soon be effected, if the agitation for the passing of the Reported Code ceased.

“ It is only a few years since that the adversaries of the Reported Code freely acknowledged the important service its first framers had done the country by giving a complete system whence the Legislature could select the special enactments considered most necessary, or wherewith it could compare them. It was admitted then that the very best laws passed since those commissioners had made some progress in their work, were chiefly owing to them, and that it was a good thing that every special reform of the Civil and Penal Law could be made part of a general reform already planned. Now such concessions are not made. The moderate reaction men seem, whenever a law reform is moved, to think only

¹ Tradition tells that this exception from the common rule was conceded as a reward of the womens’ heroic deeds in the defence of the country.

of the harmony with the old Code, as it was in 1736, not of the harmony with the law, as it now stands, or with the wants of the present time. Those wants will, however, push even the reaction men, moderate or not moderate, forwards. The Code of 1734 will, in spite of all that can be done by the admirers of the good old time, be superseded by another, — that now reported, or one still more different from it; and when that is done, honest men, who have sincerely believed in the danger of such an event, will be astonished to find how safe indeed are the changes of the old law recommended by the new Reported Codes. It will be seen then, also, how perfect is the harmony between them and the true liberal spirit of our ancient Codes, of which an excellent edition (not as yet complete, however,) has been published by one of the commissioners appointed in 1844 — C. J. Schlyter, since it was demanded by J. G. Richert.

“ One remark more, and I have done. Many Swedes complain of the slow progress of reforms; and I think they are right. Nevertheless it is due to the Nation, the Legislature, and the Government, to acknowledge that, since 1809, there has, except once in the year 1812, been no going backwards, and that there is no fear of that even now. The progress has, on the whole, been steady; and we have no reason to expect that it will be otherwise.

“ Very respectfully yours,

“ P. E. BERGFALK.”¹

ART. IV. — COMMISSIONS OF INQUIRY. ;

THE publication of two conflicting and confident opinions on the legality of the Commission of Inquiry, recently issued on the subject of the two universities of Oxford and Cambridge, is a painful exhibition either of the uncertainty of the law, or of the infirmity of human judgment.

¹ Professor of law in the University of Upsala.

The commission purports to name certain persons "for inquiring into and reporting upon the state, discipline, studies, and revenues," of the University and its colleges, and to authorise them to conduct that inquiry, by "calling before them" persons, and "calling for and examining" papers and records, likely to afford information, and "by all other lawful ways and means whatsoever." This commission is pronounced by four counsel of unquestionable ability and learning to be "illegal and unconstitutional." The three principal law officers of the Crown can find no authority against the commission, and "see no reason to doubt its perfect propriety on legal or unconstitutional grounds."

As a very formidable list of authorities is produced by the counsel for the Universities, and their opinion is entitled to great respect, it is worth while to examine them with a degree of care and research, which it should seem that neither the numerous avocations of the counsel consulted, nor the urgency of the case, would permit them to bestow. It was enough for the council for the Crown, that the cases and precedents relied upon by the University were applicable to commissions widely different from the one in dispute. It was enough for the advisers of the University, that in a posthumous work of Lord C. J. Coke, and in an apocryphal volume of loose notes, which he never published or intended for publication, they found authority for saying, that "new commissions of inquiry," and commissions "for inquiry only," are illegal. §

With respect to the supposed visitatorial power of the Crown over the University, as such, the officers of the Crown have thought it inexpedient to place any reliance on it, and the commission itself does not purport to be founded on it. In the commissions issued during the late reign to inquire into the Scotch universities this visitatorial authority was recited and not denied; and instances are not wanting, in which Oxford itself has admitted, and even asserted, the like jurisdiction. But the point in issue between these conflicting opinions is *not* the visitatorial power of the Crown, or the expediency or propriety of instituting any inquiry at all: the question is, whether it is lawful for the Government of the country, in the name of the Queen, to appoint persons

for the sole purpose of obtaining, by all lawful means, information and advice touching certain public institutions, in which the Queen and her subjects are supposed to be deeply interested.

The question is one of no small importance. If the Crown has no such power, the right and duty of inquiry must devolve exclusively on Committees of the Lords or Commons, whose powers are indisputable. That past usage is in favour of such commissions, is not denied. It is not denied by those who stated the case on the part of the Universities — with a degree of candour worthy of the eminent body whom they represented, — that like commissions have in fact issued for many years past. If they had carried their researches further back, they would indeed have found that commissions or inquiries, not distinguishable in principle from the present, have been executed by authority of the Crown habitually and without question, not only during the last half century but for centuries past. But our immediate object is, not so much to prove affirmatively the legality of the commission, as to show that the authorities cited against it are wholly insufficient to prove it to be illegal.

It is not very clear what was intended by the word “constitutional” in the case submitted on the part of the University.¹ As distinguished from “lawful,” it has no meaning on which a lawyer, as such, is peculiarly qualified to form a judgment. The counsel of the University must have plainly seen that the object of their clients was to know whether they could safely refuse to submit to inquiry, and they have therefore treated the question as one of mere law. They have not considered themselves called upon to determine whether the Minister has exercised a legal power oppressively, or inconsistently with the ordinary course of constitutional government; but they have pronounced the commission to be in itself illegal. They have even intimated, not obscurely, that it is one under which the gentlemen named in it “ought

¹ The first question submitted is, “Whether the Commission is constitutional and legal, and such as the University, or the members of it, are bound or ought to obey,” &c.

not to sit.* Such at least is the natural inference from the alleged example of Lord C. J. Coke, who, with other judges, is stated to have refused to act under a commission which, like the present, exceeded the powers of the Crown.

They tell us that "*such* commissions," that is, commissions like the one lately issued, "even in very early times, have been repeatedly condemned by Parliament and by the Judges." The citations in support of this proposition¹, are chiefly to be found in the margin of the two posthumous Institutes of Sir E. Coke, 2 Inst. 478., and 4 Inst. 163. — Let us examine them in detail, and with attention.

The first is from the Parliament Rolls, 15 Edward 3. (2 Rot. Parl. pp. 128. and 131.; printed copy.)

The species of commission complained of by the Commons was evidently a commission of Oyer and Terminer. The Commons complained of certain commissions of inquiry against peers and others, which embraced several articles or "points" properly belonging to the Justices Itinerant, and which, as they alleged, had theretofore always issued by assent of Parliament; that the justices so assigned had imposed exorbitant and disproportionate fines; had seized the lands of defaulters, and done other acts against law; and that parties indicted under them had been put on their trial before those who had been on the grand jury, and whom they had not been allowed to challenge.

The prayer of the petition was, that other commissions should be granted to proper persons by assent of Parliament. It further prayed, that the Chancellor, Judges, and other great officers of the Crown, should be appointed in Parliament, and that peers should be amenable to no process except that of their peers in Parliament.

It is not easy to see how this complaint can be adduced as an authority against the commission issued in the case of the Universities; or, indeed, against any commission at all.

¹ They are 2 Rot. Parl. 15 Ed. 3. No. 14., No. 40. Stat. 15 Ed. 3. st. 1. c. 2. 2 Rot. Parl. 18 Ed. 3. No. 3., No. 4., and Resp. to No. 1. Stat. 18 Ed. 3. st. 2. c. 1. and c. 4. 3 Rot. Parl. 2 Hen. 4. No. 22., and 5 Hen. 4. No. 39. Also 2 Inst. 478. 4 Inst. 163. 165. Year-book, 42 Assis. pl. 5. 2 Inst. 50, 51.

It so happens that the commissions are recorded on the Patent Roll of the same year.¹ One of them is a simple commission of Oyer and Terminer in the usual general form. Another, is a commission to hear and determine extortions, excesses, and other official misdemeanours of the king's ministers, high and low; offences against the customs, and other crimes and misdemeanours specially enumerated. Both are directed to the Chancellor Parning and others. The latter commission is one of a form now disused, but it is founded on patterns in the *Registrum Brevium*², and recognised as a legitimate form by Coke himself.³

The demands of the Commons were, in no sense of the word, constitutional, and their objections to the form of the commission appear to be unfounded. The consent of Parliament was never required to any appointment of Justices of Oyer and Terminer. All such commissions include part of the jurisdiction of the Eyre. All peers are amenable to the process of a court of Oyer and Terminer. With respect to their other complaints, they amount only to allegations of irregularity and excess in the execution of the commission, and may perhaps have been well founded.

The result was that the commissions were superseded⁴ except as to offences of the king's ministers and against the customs. As to the rest, the commissioners were directed to "continue process already commenced, according to law and reason, without taking any fresh inquest:—" *sanz plus comencer ou enquer de novel*." We presume, that these last words led the counsel for the University to lay claim to the case as an authority against new-fangled inquiries. It is not quoted for that purpose by Lord C. J. Coke.

The Parliamentary proceedings of this year gave rise to the statute, 15 Edw. 3. st. 1., which was shortly afterwards repealed. Hardly a chapter of it can be cited as containing a declaration of the Common Law; and the chapter (c. 2.) on the arrest and trial of peers and great officers of the

¹ Pat. 15 Ed. 3. part 3. dorso. ² Reg. Brev. f. 125, 126. ³ 4 Inst. 163.

⁴ In Cotton's Abridgment, p. 35., they are said to have been "revoked;" which is an error.

Crown, referred to in the Opinion, was founded on a misconception of the privileges of the peerage.

The next authority is from the Rolls of Parliament, 18 Edw. 3.¹ In that year the Commons complained of several commissions.

The first, referred to in the Opinion, was a commission of Array, under which it was alleged that the commissioners had levied money on the people to pay the king's troops, and had unjustly seized, without payment, victuals and copper utensils.

The answer of the king declares that the soldiers should be paid by the Crown, and the statutes of purveyors shall be duly observed.

It is most certain that commissions of Array were at this time, and long afterwards, strictly legal. They were, in fact, for a very long period, the ordinary method of raising an army. Such commissions were, no doubt, liable to abuse, but the Commons can never have intended to dispute their legality. They only denied the power of the commissioners to levy money for the pay of the troops raised under them, or to revive the old law of Purveyance for the king's use under colour of them. In this respect their complaint was legitimate, and the justice of it was recognised, but the commissions continued to be constantly issued down to the date of standing armies; and we suspect that such a commission is still nominally included in the appointment to more than one local government and lieutenancy in this country.²

The Opinion refers to another commission condemned at the same Parliament.³ It was a commission for assaying weights and measures.

The Commons complained not so much of the commission as of the extortions of the persons acting under it. It was however recalled absolutely, and a statute was passed providing that no commission to assay weights, &c. should thereafter issue. (Stat. 18 Ed. 3. st. 2. ch. 4.)

¹ 2 Rot. Parl. p. 149.

² See Gerard's case, 2 W. Blackst. Rep. 1127. The Captain-general or Governor of the Isle of Wight, until lately, had such a commission.

³ It is marked No. 5. in the copy before us; but No. 4. must be intended. No. 5. relates to the staple in Flanders.

Commissions to assay weights and measures were in the nature of commissions of Oyer and Terminer, and not of mere examination and inquiry. The issuing of them is almost yearly indorsed on the Patent Rolls under the descriptive words "*De ponderibus et mensuris supervidendis*," or "*examinandis*;" and Sir M. Hale adverts to them as a known form in his *History of the Pleas of the Crown*.¹ They certainly were not "of new invention," as Lord Coke has surmised in 4 Inst. 163. The Parliament in 14 Ed. 3. complained of the neglect to enforce the law respecting weights and measures, and it is probable that the very commission abolished in this parliament of 18 Ed. 3. was one actually issued at the prayer of the Commons in the preceding year, when we find² them petitioning the king to grant, as theretofore had been used, a commission "to inquire of weights and measures;" to which prayer the king acceded. The writs issued at the end of the Parliament roll of this year (18 Ed. 3.), show clearly that the real ground of complaint was, that the commissioners "*in executione commissionis hujusmodi falsè et nequiter se gessisse*," . . . "*debitam commissionum executionem juxta formam et tenorem earundem nullatenus faciendò*."³

Another petition and answer at the same Parliament are also relied upon as a precedent against all such inquiries⁴; and as the statute consequent upon them is cited by Lord C. J. Coke in the 2nd and 4th Institutes, the authority would be of great weight, if his remarks were really intended to apply to such a commission as the University Commission.

The Commons complain of certain commissions which they

¹ Hale, H. P. C. vol. ii. p. 21. Commissions to Assay weights, &c., were continually issued after the parliamentary condemnation of them down to the reign of Henry VII., when their powers were transferred to Justices of the Peace by Act 11 Hen. 7. c. 4. See Cal. Rot. Pat. 30 Ed. 3. p. 2.; 31 Ed. 3. p. 1., &c.; 25 Hen. 6. pt. 1.; 16 Ed. 4. p. 2. m. 3., &c. A Commission of Assay is among the franchises of the University of Oxford, granted subsequently to 18 Ed. 3., viz. 29 Ed. 3. It is curious that this commission should be now cited by the advisers of that university as a specimen of an unconstitutional inquiry *ejusdem generis* with the one lately issued.

² 17 Ed. 3.; in 2 Rot. Parl. p. 141. No. 39, 40.

³ See 2 Rot. Parl. p. 156. No. 47, 48.

⁴ 2 Rot. Parl. pp. 148, 149. 151.; Petition, No. 1.; Respons. No. 1.

call "*les nouvelles enquerrez*," i. e. the "*recent inquiries*," and of the outrageous fines inflicted under them, and of outlawries for offences for which outlawry did not lie.¹

The statute passed on the occasion of this complaint provides that the particular commissions complained of should cease, except as to felonies and offences against the peace, offences against the customs, and some other specified cases, and that the outlawries should be reversed. (Stat. 18 Ed. 3. st. 2. ch. 1.) At the back of the Parliament Roll are entered the writs issued to the commissioners, Thorpe and his companions, designated as justices of Oyer and Terminer, to give effect to the Act. They were directed to stay proceedings, and return them into Chancery, to be thence remitted and terminated elsewhere; and thereupon, a fresh commission issued to try the undetermined indictments.²

We are unable to identify the superseded commissions with any of the numberless judicial commissions indorsed on the Patent Rolls of this year; but it appears by the recital of them in the substituted commission, that one was a common commission of Oyer and Terminer, and the other a special commission to try ministerial extortions, &c. Such commissions were not illegal, nor were they treated as illegal. The substantial ground of complaint was the misconduct and excess of the justices.³ Neither the proceedings in Parliament, nor the language of the statute, have the least application whatever except to a court of Oyer and Terminer; and under that head they are noticed by Lord Coke in his Fourth Institute. The whole transaction is a good precedent for putting an end to an obnoxious commission of Oyer and Terminer, and transferring its business to another court.

The next authority cited in favour of the University is a

¹ "Novel," used by this parliament, plainly means *recent* or *newly issued*; not new-fangled, or novel *in genere*. They speak (2 Rot. Parl. 152.) of "*commissions faites de novel*."

² See Pat. Rol. 18 Ed. 3. pt. 2. mem. 38. dorso.

³ The statutes 18 Ed. 3. st. 1., & 18. Ed. 3. st. 2. c. 5., prove that process of outlawry had been illegally awarded in some cases for offences which were nevertheless within the commission. One article of inquiry, viz., the extortions of ecclesiastical officers, was offensive to the clergy; see st. 15 Ed. 3. c. 6., and the petitions in 18 Ed. 3.; but the jurisdiction of the king's courts was indisputable.

complaint in Parliament, in the second year of the reign of Henry IV., against "divers commissions" lately issued for making barges and ballingers without assent of Parliament, and "otherwise than as heretofore."¹ The king revoked them, and promised to consult his Parliament as to procuring ships.

This notable precedent was claimed by *both* sides in the great case of Ship-money. Hampden's counsel relied on it to show that the King had not the power asserted to belong to him. The Crown officers contended that in the above case the king only consented to annul *that particular commission* by statute. There is an inherent ambiguity in all such parliamentary precedents; for the very interference of the Legislature would seem to indicate, *primâ facie*, that the measure annulled would be otherwise valid and lawful.

The supposed "commissions" were, in fact, *writs* issued to the corporation of every city and sea-port town in England, commanding them to build and equip certain barges or ballingers to resist an impending invasion — "*de novo fabricari faciatis*,"² &c.; and they were certainly writs without a precedent. Indeed the king was aware of this, and promised that the writs should not pass into one. In what degree such a writ can be likened to an authority to take, not ships by force, but information voluntarily given, we may leave others to determine; but it is worthy of remark, that if, instead of ordering ships to be built, the King had commissioned his officers to *take* both ships and mariners, the commission would have come within a known prerogative, which has found advocates in Sir Michael Foster, Lord Mansfield, and the late Charles Butler; — a prerogative which, if we mistake not, is still latent in the commission of the Lord High Admiral, though our long and happy exemption from foreign invasion has left us to discuss at our leisure the expediency or legality of executing the old warrant "*de navibus et marinariis arrestandis*."

Another precedent from the Rolls of Parliament is in

¹ 3 Rot. Parl. 2 Hen. 4. p. 458. No. 22.

² See the writ in 8 Rymer, p. 173.

³ See Foster, C. L. 166.

5 Henry 4.¹ Like some other marginal references in Lord Coke's works, especially his posthumous work from which the University advisers have borrowed this reference, it does not "come up to the doctrine which it is cited to support."¹

The Commons petitioned the Crown in favour of one Willman, who had been imprisoned and put to answer before the Constable and Earl Marshal against the common and statute Law; and thereupon the king granted, *by assent of Parliament*, that Willman shall be impleaded at common law, notwithstanding any commission to the contrary. And accordingly a writ issued to the court of King's Bench, reciting this act, and directing that court to do "prout de jure et secundum legem et consuetudinem Angliæ fore videritis faciendum."

Now we know nothing about the ground of the process against Willman, but we know that the constable and marshal held a court *ex officio*, (and not by any commission), which had both civil and criminal jurisdiction, and did not proceed according to the course of the common Law. Possibly, Willman was wrongfully sued in that court. Perhaps his case was transferred to the King's Bench as a matter of special grace and favour, and by authority of Parliament. At most the case can amount to nothing but a precedent for removing a plea pending, perhaps irregularly, in one of the King's courts into another court. The "commission" referred to on the roll, if the word be correctly used, can mean only that under which the two great martial functionaries held their respective offices. Their proceedings were a constant subject of complaint in and out of Parliament, and were regulated by statutes in the reign of Richard II.², but the Court has never been formally abolished. Like other jurisdictions, it often tried "*ampliare jurisdictionem*;" but the tribunal itself was then neither illegal nor novel, nor was it treated as such by the Commons.

We have now exhausted the early instances in which the Parliament is supposed to have condemned "such com-

¹ 3 Rot. Parl. p. 530. No. 39.

² This observation on Coke's references is made by Butler, in his *Reminiscences*, p. 116.

³ Stat. 8 R. 2. c. 5.; 13 R. 2. c. 2.

missions" as those lately issued by the Crown. Two of them are found to be cases of commissions of Oyer and Terminer oppressively and vexatiously executed. Two are commissions for arraying troops, and for the assaying of weights and measures, neither of which are complained of as illegal in themselves. A fifth is a writ for levying ships without assent of Parliament, and the sixth is a petition respecting a suit pending in the court of Chivalry. Not only have these cases no resemblance to the one in dispute, but they fail even to supply any analogy or argument. Of the four commissions not one was new to the law or constitution. The others were not commissions of Inquiry, nor indeed commissions at all.

Let us now consider to what extent the judicial authorities cited in the Opinion before us throw light upon the legal character of the commission.

The first of these (omitting for the present the passages referred to in the text of Coke's posthumous Institutes,) is from the *Liber Assisarum an. 42 Ed. 3. placitum 5.*, noticed in the margin of 4 Inst. 163. An indictment was found against certain persons for imprisoning the prosecutor. On the trial at the Assizes, the defendants showed in their defence a commission out of Chancery authorising them to take the prosecutor and his goods, and to imprison him. The judge held that such a commission was no defence, and expressed his surprise at the issuing of it, and promised to bring it before the Council Board. This is all we know of the case from any authentic record. Whether it was a commission under the Great Seal, or a commission of the nature of a commission of Rebellion out of Chancery, or one fraudulently obtained to extort money, does not appear. Coke takes it for granted that the party arrested was "a notorious felon,"¹ but he cites only the Year Book, where that fact is not stated. The process for apprehending a felon is so simple, that a commission out of Chancery would seem to be the last thing likely to occur even to the most wrongheaded prosecutor in the 14th century, especially as the arrest of a

¹ 2 Inst. 54.

"notorious felon" might have been effected without any warrant or commission at all. But these speculations are superfluous, and the case may well stand as a good *Nisi Prius* decision, that the imprisonment of a party under warrant of a Chancery commission, without showing any bill, indictment, suit, process, or legal authority to arrest, other than the mere commission, is a false imprisonment for which an indictment will lie. We may further add our suspicion that, if the warrant had been an authentic commission of Rebellion, of unimpeachable form, issued by Lord Chancellor Bacon, and if the Judge of Assize had been that determined champion of common law jurisdiction, Lord C. J. Coke, the defendants might have been in some peril of a conviction!

There is a case in Dyer's Reports¹, called *Scroggs's case*, mentioned by Coke (2 Inst. 478.) as an instance of a newly framed commission of inquiry, not warranted by law. It is not cited by name in the University opinion, but as the above passage in the Institute is referred to, it is possibly relied upon in support of the Opinion. Scroggs had been appointed to the freehold office of Exigenter in the Common Pleas by the Chief Justice. One Coleshill laid claim to it by the nomination of the Queen, and thereupon, at his instance, the Queen issued a commission to hear and determine the title to it between the parties, with power to proceed by bill and answer, and to displace Scroggs and instal Colehill, if he should be entitled. Scroggs demurred to the jurisdiction, and was committed to prison by the new court for his contempt in not answering; whence he was discharged by Habeas Corpus, because the Court was not lawfully constituted.

There can exist no doubt that the Crown cannot create a new court of Equity, and, still less, a court of Equity to decide on a freehold title, eject the occupant, and deliver seisin to the right owner. The first step taken by the Queen was unexceptionable. Finding her own appointment disputed, she commanded the Keeper of the Great Seal to inquire into the right of appointment and to report to her

¹ f. 175. a.

upon it. The Lord Keeper consulted the Judges, and ascertained their unanimous opinion that the right of appointment was in the Chief Justice; and with this the Queen herself appears to have been satisfied.

Now if this "command" to the Lord Keeper had been, as in substance it was, a "commission" to inquire and report, it would have been such a precedent as Coke himself could not have disapproved of. The most scrupulous lawyer would hardly have pronounced an inquiry to be unconstitutional, and against *Magna Charta*, by which the rival candidates would probably have been spared the costs and trouble of being parties to an information of Intrusion in Her Majesty's court of Exchequer. Such a commission would indeed have borne some resemblance to the present. The one actually issued has none whatever.

The remaining judicial authorities are chiefly derived from the reports ascribed to Lord C. J. Coke, and published as the Twelfth Part of his Reports. Probably there never before was an important case in which so much reliance has been placed on this work,—a volume in which an anonymous editor has thrown together, without method or discrimination, the rejected sweepings of that great lawyer's maturer labours; loose notes of the judgments and private opinions of himself and others; extracts from text writers and reporters; memoranda of private conferences, and of extra-judicial interlocutions at Whitehall, York House, Lambeth, and Serjeants' Inn;—forming, together, a very untrustworthy collection of doubtful law, and a noble record of judicial honesty at a very momentous crisis of our history.

It is, however, quite needless to question the authority of any of the cases in this volume referred to in the opinion before us. They turn on the ecclesiastical commissions issued in the reign of James I. or Elizabeth; and if every one of them, as well as those issued before the statute of Elizabeth¹, had been wholly illegal, they would have afforded no test of the lawfulness of a commission wholly dissimilar.

The High Commission was an ecclesiastical court ended

¹ 1 Eliz. c. 1.

with an enormous power over the persons, fortunes, and consciences of every lay and spiritual subject in the kingdom, and claiming to exercise much more than it really had. The commission of Queen Victoria is not an ecclesiastical court, nor any *court* at all. It neither possesses, nor claims to have, any compulsive process. Except to the servants of the Crown, it can issue no authoritative command. It is impossible to point out anything in common between the two instruments but the name of a Commission.

The commissioners, therefore, have really no interest in asserting the legality of the courts instituted by Henry VIII., Edward VI., Elizabeth, James I., or James II., though Lord Coke has nowhere, that we can find, brought against the four first any indiscriminate charge of general illegality. We cannot find in the case referred to (12 Co. 84.), any authority for the statement of counsel, that such commissions were wholly against law, if unsupported by a statute.¹ That case only shows that a mere Ecclesiastical court, whether founded on the statutes passed after the Reformation, or on the inherent authority of the Crown before 16 Car. c. 11., had no general power to fine or imprison, or to proceed except according to the known praxis of the Court Christian.

Still less are we able to discern in any of the citations before us an authority for the proposition, that an unwarrantable clause in a commission, in other respects legal, professing to confer some power or jurisdiction which the Crown cannot impart, will render the whole commission itself illegal or void.

It is, no doubt, highly inexpedient to insert in commissions or authorities of any kind, public or private, provisions which mislead either the depositaries of them, or third persons, as

¹ If the reporter had so laid down the law in 12 Co. 84., he would have contradicted the clear opinion of the Court in *Caudrey's case* (5 Co. 8.), and his own opinion in 12 Co. 19., that the statute 1 Eliz. was "not introductory of new law, but declaratory of the old." To the same effect are 2 Rol. Ab. 219.; Cro. Jac. 37.; Moore, 755.; Com. Dig. Prærog. (D. 9.). The old Commission of Review was not founded on any statute. The Act 16 Car. 2. c. 11. abrogated not only 1 Eliz., but all commissions like the High Commission. It was in contempt of this last statute, and indeed of all law, that James II. issued his well-known commissions.

to their real operation. The comprehensive language of a conveyancer's description of parcels has often cruelly deceived the owner of an estate, who fancies himself the possessor of countless "ways, watercourses, fisheries, ferries, markets, frewarrens," &c. &c. because he finds those words in his title-deeds. In like manner a country justice may, if he inspects his commission, conceive a very exaggerated notion of his jurisdiction over all "forestallers, engrossers, regrators, enchanterers, sorcerers, magicians, &c.," and other extinct crimes and misdemeanours, which were left standing in the form of commission long after they had ceased to exist. But we are aware of no rule of law that pronounces the whole instrument to be vicious, because some subordinate and independent provision in it exceeds the powers of the donor. Certainly no such rule can be deduced from the instances cited in the opinion.

It is said that when certain powers not warranted by the statute 1 Eliz. c. 1., were introduced into commissions issued under that Act, "Lord Coke refused to act on such a commission, considering it illegal, and holding that where a commission is against law, commissioners ought not to sit by virtue of it."

The particular instance referred to is reported in 12 Co. 88., where the Lord Chief Justice, being summoned to sit on an ecclesiastical commission, persisted, with a degree of scrupulousness rather nice perhaps than wise, in *standing up*, lest he should be supposed to be *sitting* under a commission in which he declined to act. "I refused," said his Lordship, "for these causes; 1. for this, that I, nor any of my brethren, were acquainted with the commission; 2. that I did not know what was contained in the new commission, &c., and *if the commission be against law*, they ought not to sit by virtue of it; 3. that there was not any necessity that I should sit, who understood nothing of it, as long as there were other judges there; and, 4. that I have endeavoured to inform myself of it, and have sent to the Rolls to have a copy of it, but it was not enrolled."¹

¹ At this day, these proceedings at the Archbishop's palace would hardly have been considered as supplying a reportable case; but, at all events, if the

The meeting then appears to have broken up after reading the voluminous commission and dismissing the restive Chief with the promise of a copy to consider at his leisure, and of a sermon by the Archbishop at their next meeting "for the better informing of the commissioners of their duty."

It is a very forced inference from all this, that no commission can be lawful, if there be any one direction or authority in it, which cannot lawfully be carried into effect. Some of the very cases noticed in the Opinion lead to a different conclusion¹, and none go further than to show that excess in the execution of a legal commission may be corrected by Prohibition, by Habeas Corpus, or by the private right of resistance and non-compliance.

To these authorities the counsel for the University anticipate an objection:—"It may be said, that the present commission differs from the Ecclesiastical commissions, inasmuch as it directs inquiry only, and not to hear and determine, &c.; but commissions for inquiry and discovery alone are illegal, because they put parties to answer otherwise than according to the old law of the land;"—and for this they quote Magna Charta, and the statutes enforcing the *judicium parium*, the *lex terræ*, &c., with other *decantata* to the like

learned Judge had prepared this report for publication, he would have reduced his four reasons to one; for the 1st, 2d, and 4th are the same differently expressed, and the 3d is none at all, unless a judge may refuse to sit wherever there is any one else to do his duty. Lord Coke had a stronger motive than any of these for keeping aloof from a commission which he could more effectively control from the vantage ground of his own court.

¹ In a *post prandial* resolution, reported 12 Co. 19., the Judges and Serjeants resolved that, notwithstanding a clause in their commission enabling them to imprison, the commissioners "*ought to proceed* according to the ecclesiastical law." So it was resolved by Coke and the Judges of C. P. in *Ball's case*, 12 Co. 49, 50., that, where the commission expressed a power to apprehend the party, they *ought to proceed* by citation and ecclesiastical censure, and to disregard the illegal power. So where the Lord President and Council of York were armed by one commission with two authorities, viz., to hear and determine offences according to law and "sound discretion," and also to hear real and personal actions, Coke, C. J. and the Chief Justice of the King's Bench, "resolved without question" that the President and Council were authorised only to act as on a simple Commission of Oyer and Terminer according to law; and that the clauses about "discretion" and the trial of actions, being void in law, were to be regarded as *in terrorum* clauses, added only "*ad faciendum populum*." 12 Co. 50—56.

purpose, and especially the well-known case of Commissions of Inquiry, 5 Jac. 1., in 12 Co. c. 31.

This is not the first occasion on which this last case has been cited for the proposition that Commissions for Inquiry alone are illegal. It is very singular that, although Lord Coke has usually noticed in other works, especially in his 4 Inst., the most material cases contained in the two Parts called 12th and 13th Coke's Reports, and although we have seen that in the 2nd and 4th Institutes opportunities presented themselves in which a reference to this case would have been eminently apposite, yet we cannot find the slightest allusion to it in those or (as we believe) any other of his works. This, and other facts noticed hereafter might well shake the authority of the case itself; yet we have reason to believe that the facts are correctly stated in it, and that some such extrajudicial opinion as the one reported was really pronounced somewhere. The Report, as it stands in print, is unintelligible, but we have the means of amending it, so as to remove some of its obscurity.¹

The Report states, that certain Commissions in English under the Great Seal were directed to persons in various counties to inquire of certain articles annexed; that they were to inquire only, without power to hear and determine "the said offences;" that the commissioners took presentments in English and returned them into Chancery, and that the two Chief Justices and seven puisne Judges resolved that the commissions were against law for three causes. The occasion on which the opinion was given is not stated. If in the Exchequer Chamber, we should have found some other record of it. It may have been (as most other cases in this 12th Part were) in the Star Chamber, or before the Privy Council, or at an extrajudicial conference, or at a "colloquium ad mensam" at Serjeants' Inn.

The commissions in question are indorsed on the Patent Roll, 5 Jac. Part 26., memb. 15., and bear date Aug. 27.

¹ The Report is dated *Trin. 5. Jac.* This was before the date of the Commissions. So that either the year or the term must be misstated. The mistake runs through all the MS. copies.

The form recites the decay of dwelling-houses, conversion of arable into pasture, and other "sinister practices," by which the realm was wasted and depopulated "against the ancient common laws and statutes of the realm," and then assigns the Lord-lieutenant and others to be commissioners to inquire, by the oaths of twelve lawful men, &c., and by examination of witnesses and other lawful ways, of certain articles annexed to the commission. Then follow the usual directions in a commission of Oyer and Terminer to appoint certain days and times to inquire, &c.; a direction to certify the inquisitions into Chancery by Oct. 20. then next; and the usual clauses of *venire facias* to the sheriff, and of attendancy and assistance to all justices, mayors, and other officers and ministers.

The Articles appended instruct the Commissioners to inquire:—

1. Of towns, villages, churches, houses, farms, &c. wasted or depopulated since 20 Eliz., and the persons in default.

2. Of lands converted from tillage to pasture by unlawful enclosure, and by whom.

3. Of lands severed from farm-houses, so as to leave insufficient for the use of the occupants, and by whom.

4. Of barns and outhouses pulled down, decayed, or deserted, and by whom.

5. Of those who keep on hand several farms, and let the farm-house stand void or occupied by the poor.

6. Of farmers removed from their houses by their landlords, and the houses left vacant, and by whom.

7. Of obstruction of highways by unlawful enclosures, and by whom, &c.

There can be little doubt, from the tenor of the commission, that these various heads of inquiry were then assumed to be "offences" either at Common Law, or by Statute. Some had been dealt with as such in a long series of temporary acts from 4 Hen. 7. c. 19. (so much extolled by Sir Francis Bacon in his History of Henry VII.,) down to 39 Eliz. c. 1. and c. 2.¹ One of these acts, 5 Eliz. c. 2.,

¹ These were 4 Hen. 7. c. 19.; 6 Hen. 8. c. 5.; 7 Hen. 8. c. 1.; 25 Hen. 8.

provided that commissions should issue into every county to inquire and certify into Chancery offences under that and previous acts. By 39 Eliz. c. 1. and c. 2: a new set of provisions replaced the old ones, and Justices of Assize and Quarter Sessions were empowered to inquire, hear, and determine such offences by inquisition, indictment, &c.; and this act was continued by an act, 1 Jac. 1. c. 25., till the end of the first Session of the *next* Parliament.

The Parliament of 1 Jac. was not dissolved till December 1610, so that when the point in 12 Co. 31. arose, the last of the above statutes was still in force.

Some of the offences enumerated in the Seven Articles are not specified in any of these statutes; but the prevailing notions of political economy probably supplied this defect. Even Coke seems to have thought that the owner of houses in a town might be lawfully prohibited from pulling them down¹, and indicted for doing so, and that the offence of "not re-edifying houses of husbandry which a man hath depopulated" could not be discharged by a pardon.²

It is plain, therefore, that the offences enumerated in the Articles attached to the above commissions of Inquiry were surmised to be of an indictable quality, either at Common Law, or under some Act, and that the commissions themselves were designed to put the Crown in possession of the authentic presentment of a jury, made upon oath with all the form of a Court of Oyer and Terminer, or other Court of criminal jurisdiction.

Before the act 4 Geo. 2. c. 26. all judicial records must have been in Latin.³ An English commission of Oyer and Terminer and an English finding of a Grand Jury were no records at all. Whether such a presentment could have been removed into the King's Bench is questionable; it cer-

c. 13. sect. 14, 15.; 27 Hen. 8. c. 22.; 5 & 6 Ed. 6. c. 5.; and 2 & 3 P. & M. c. 2. (which also provided for the issuing of commissions); 5 Eliz. c. 2. continued by successive acts to 35 Eliz. c. 7.; 39 Eliz. c. 1. and c. 2.; 43 Eliz. c. 9.

¹ 3 Inst. 204, 205., and 12 Co. 13.

² 12 Co. 30., "Of Pardons."

³ See Preface to 3 Coke's Reports.

tainly could not have been traversed and tried there. The use that was to be made of the inquisitions so filed in Chancery, and of the fears of the parties whose guilt was found by them, was soon apparent.

On the 15th of January after the return of the inquisitions a second commission issued, directed to Lord Chancellor Ellesmere and other great officers of the Crown, reciting the returns, the submission of many of the offenders and their willingness to compound for the penalty of their offences, and empowering the commissioners to compound accordingly with offenders charged by the inquisitions, to grant exonerations, and to cause pardons to be made out under the Great Seal to those with whom they had settled.¹

With these facts in view, it will be more easy to understand the report in 12 Co., especially after the text of it shall have been rectified.

It is not, perhaps, generally known that the 12th and 13th Parts, though originally written, like the others, in French, were never published in that language. The first edition, in 1656, was printed in English in conformity with the Parliamentary Ordinance for the use of that language in law books; and this edition, not, as it should seem, a very correct translation, forms the basis of the succeeding editions. Of the 12th Part there are at least five manuscript copies, in the original French, all easily accessible. In two of these—viz., one in the Hargrave MSS., No. 34., said to be from Coke's own handwriting, and one in the Maynard MSS. at Lincoln's Inn,—this case on Commissions of Inquiry has not been found.² The other three are in the Lansdowne MSS., No. 601. and No. 1079., and the Harleian MSS., No. 4815—6. The last contains duplicate copies of this very case. The MS. No. 601. Lansd. appears to have belonged to Sir Matthew Hale, and has his autograph.

Below will be found a transcript of so much as contains the "three causes" for which the commissions were held to

¹ Pat. Rot. 5. Jac. on the dorse of Part 18. It is a very long instrument, but the substance is as above stated.

² The Harg. MS. seems to be only a selection.

be against law, taken from the copies in the Harl. MS.¹ The following may be accepted as a fair translation, printed by the side of the corresponding part of the last published edition.

EDITION 1826.

1. For this, that they (the Commissions) were in English.

2. For that the offences inquirable were not certain within the commission itself, but in a schedule annexed to it.

3. For this, that it was only to inquire, which is against law; for by this a man may be unjustly accused by perjury and he shall not have any remedy.

4. For this, that it is not within the statute of 5 Eliz. &c.

Also the party may be defamed, and shall not have any traverse to it.

Such a commission may be only to inquire of treason, felony committed, &c. And no such commission was ever seen to inquire only, (*i. e.* of crimes.)

In margin of last paragraph. "Quære if not treasure trove, and felon's goods."

TRANSLATION FROM THE MS. COPY.

1. For this, that it, (the Commission) was in English.

2. That the offences inquirable were not contained within the commission itself, but in a schedule annexed to it.

3. For this, that it was to inquire only, which is against law; for by this a man may be unjustly accused by perjury, and he shall have no remedy for it, for such commission is not within the statute of 5 Eliz. &c., and so the party shall be defamed and have no traverse to it. A like commission to inquire only might (or may) be granted of treason, felony, &c., and no such commission was ever seen to be allowed in our books to inquire only.

[There is no parenthesis at the end, nor any marginal note. These appear first in the third edition, 1727.]

It will be seen that the third reason (which is not very clearly expressed even in the original) has been broken up by a later editor into four paragraphs, so as to make two, if not three, reasons out of one, and to superadd a legal proposition which is clearly not tenable, and is apparently contradicted by the next sentence. The words in the parenthesis (to which the law officers of the Crown seem to attach im-

¹ "Fuit resolve . . . que les dite comissions furt encounter ley pur 3 causes. 1^o pur ceo que ceo fuit in Anglois. 2^o que les offences inquirable ne furt conteine deins le comission meme, mes in un schedule annex a ceo. 3^o pur ceo que fuit solement a inquire, que est encounter ley, car pur ceo home p^t e^t injustement accuse per perjury et il navera ascua remedy pur ceo, car tiel comission ne est deins le Statute de 5 Eliz. &c., auxi le party serra defame et navera ascun traverse a ceo. Autiel comission p^t e^t grante d'inquirer solement de treason, felony, &c., et nul tiel comission unques fuit view dest' allow in nostre livres de inquirer solement."—There are slight variations in all the MSS.

portance) were inserted only in the last century; and the marginal quære is the conjectural emendation of the editor to explain the repugnancy of the two last sentences.¹

Substantially, the third ground of objection to the commission is this, that, if it were legal, then a man might be charged by the regular presentment of a jury with an indictable offence, which he would have no means of putting in issue; for the Court so constituted could not try it, nor could the presentment (not being a record) be removed for traverse and trial in the King's Bench; nor was the commission within the act 5 Eliz. c. 2., for that act had expired; nor within the acts 39 Eliz. c. 1. and c. 2., for those had appointed a trial by indictment or presentment at the Assizes or Quarter Sessions; — that, if legal, then a like commission might issue even in such cases as treason or felony, for which there is no precedent in any of our books.

The whole affair seems to have been a scandalous experiment to establish a new species of truncated court of Oyer and Terminer, that should inquire and hear, but not determine. If it had found a less sturdy opponent of such experiments than Coke, the Stuart princes, always sorely impeded by juries and parliaments, might have laid the foundation of a new method of obtaining verdicts and of raising money. The statute 2 & 3 P. and M. c. 2., already noticed, would have supplied a precedent for removing inquisitions, found by such a commission and filed in Chancery, into the Star Chamber, if the parties presented had shown themselves indisposed to buy their pardons from the second commission.

The reigns of James and of Charles I. teem with such experiments. In that eventful period it is impossible too highly to estimate the services of that intrepid lawyer, the closing years of whose life were, happily for his country, spent in

¹ An ingenious contemporary (Law Magazine, No. 92. p. 84.) is disposed to adopt this emendation of the text. The cases of inquisitions as to felon's goods, treasure trove, &c., are certainly examples that negative the general rule attributed to Lord Coke, viz., that *no commission can be for inquiry only*, but the words in this part of the text are clear in all the copies, and require no amendment. The only variation, is that there is no *etc.* after the word "felony," in one of the MS. copies examined.

throwing the weight of his immense learning into the scale of constitutional liberty.¹

The doctrine in 12 Co. 31., thus explained, must meet with the universal assent of all lawyers; but they will not so readily receive it as an authority, that all commissions for inquiry alone are against law. That the Judges treated the commission as a *judicial* inquiry into alleged offences, or a new-fangled court of Criminal Jurisdiction, is evident from the two first reasons, as well as the last, which are applicable *only* to such commissions. There never was any obligation to write all letters patent, or to enrol commissions, not judicial, in Latin. Commissions with schedules of articles or instructions annexed, and incorporated by reference to them, were no novelties²; but a special commission of Oyer and Terminer, containing no specification of the offences to be tried under it, was unprecedented in the authentic formularies of law. It never could have escaped the recollection of Lord C. J. Coke, that a mere commission for inquiry only was in many shapes of familiar occurrence. What was a commission of Escheat or Inquisition *post mortem*, or a writ (in the nature of a commission) *ad quod damnum*, but a commission for inquiry only? Commissions of mere inquiry and discovery, with the inquests on them, are among the most common records of the Exchequer. As early as 1402, an act, 4 Hen. 4. c. 9., recognises "commissions made in Chancery directed to divers persons of the realm, sometime to inquire and certify; sometime to inquire, hear, and determine;" and Coke has elsewhere distinguished the two kinds; "and so," he says, "note a diversity between commissioners of Inquiry, and of Oyer and Terminer."³

¹ It is questionable whether the resolution reported in 12 Co. 31. became public at the date attributed to it in the Report; for there are several similar commissions of later date in the reigns of James I. and of Charles I. They will be seen in Rymer. The commissions in 12 Car. 1. vol. xx. pp. 26. 36. and in 14 Car. 1., *ibid.* pp. 243. 257., are liable to some or all of the same objections.

² The instructions to the Lords Presidents were separate from the commissions, and Lord Coke complained that they were kept secret. At his instance they were enrolled with the commission among the Patent Rolls. 4 Inst. 242. 246. Case of the Lords Presidents, &c. 12 Coke, 55. Other instances of separate instructions will be found in the three last volumes of Rymer.

³ 4 Inst. 163. *in margine*. The Herald's Visitations were all under com-

We are far from referring to any of the above as exact counterparts of the University Commission; but they are sufficient to show that Lord C. J. Coke cannot possibly have intended to condemn all commissions which have inquiry alone for their object. Our view is supported by the opinions of the two ablest of our text writers on criminal law, who deduce from the case in 12 Co. 31. a much more confined proposition.

Hale says, "As to matters of misdemeanour, especially such as are capital, as treason or felony, no such commission of inquiry only is warrantable. 5 Jac. 12 Co. rep. 31."¹

So Hawkins: "Writs to inquire of offences, without authorising them also to determine them, are illegal, except in such cases wherein they are allowed by ancient usage, as writs to sheriffs," &c.²

It is not to an inquiry set on foot solely for obtaining general information for the sound government of the country, and seeking that information by no compulsory process, that the language of Lord Coke can be rationally applied. By such an inquiry, how can the Bill of Rights, or "old law of the land," be said to be contravened? Where there is no pretence of process to seize, or disseize, or to imprison; no power assumed to outlaw, to banish, or to destroy; no mission of the Queen's Justices, or judgment of the Queen's Court³, why this appeal to the intact palladium of the Great Charter? It is only by the colourable jurisdiction of some Court, con-

missions, which were for mere inquiry. If illegal, their registers ought not to be admitted as evidence in pedigree cases. If the reports in 12 Co. are to be trusted, Coke was not always so scrupulous as he ought to have been about commissions. In the Case of Saltpetre, in 4 Jac., he gave his sanction to commissions for searching for, digging, and taking saltpetre, in "all the lands, grounds, and possessions" of the subject not being houses, &c., without paying for it, as being "the true prerogative of the king," (12 Co. 12—15.); and this although there had then been only two precedents for them! This would have been an admirable opportunity for turning to account his learning on the law of "novel commissions" and of filling his margins with the remonstrances of the Commons against the capture of ballingers and copper kettles under Plantagenet commissions; but alas! his margins are here blanks.

¹ 2 Hale, H. P. C. 21. ch. 3. Touching special commissions of Oyer and Terminer.

² 2 Hawk. C. L. B. ii. chap. v. on Justices of Oyer and Terminer.

³ See Magna Charta, cap. 29. "Nullus liber homo," &c.

stituted to take cognisance of crime and invested with an ostensible power to present it, that a man can be said to be "put to answer," or to be "falsely accused by perjury," or "defamed without a traverse," in the sense in which those expressions are used in the statute 42 Edw. 3. c. 3 & 4., and in the case in 12 Co. 31. True it is, that in the course of *any* inquiry, which it may be the office and even duty of the Executive or its ministers to make, — an inquiry, for example, into the condition and tenure of land in Ireland; an investigation of the causes of pauperism in one district, or the management of factories or mines in another, — a clear case of illegal oppression or of individual delinquency may be disclosed; but if no hair of the delinquent's head can be harmed, nor any penny of his property taken, save by the judgment of his peers or ordinary process of the courts, we venture to indemnify the commissioners against the anathema pronounced in times past "in pontificalibus et candelis accensis" on the transgressors of Magna Charta.

The remaining authorities adduced in the Opinion require only a short notice. They appear to be addressed to certain arguments supposed to have been used in support of the commission.

It is stated, that the commission is not a voluntary one, but *purports* to give compulsory powers for obtaining evidence, and that this assumption of power is illegal:

That the inability of the commissioners to enforce such powers or to administer an oath necessarily makes the inquiry defective and unfair to the parties subjected to it:

That even considered as a purely voluntary inquiry, it is illegal, and stands on the footing of the old Benevolences, which have long been condemned, because "in such cases the Crown and the subject are not on equal terms; and the Crown cannot constitutionally solicit against a subject that which it cannot command."

With respect to the clause in the Commission which purports to give an authority to call for persons and papers, we have already observed, that if it had been expressed in terms unequivocally importing an illegal assumption of power, the utmost effect of it would have been to make the provision

void, but not the whole commission. If the advisers of the University had turned to the debates in 1835 on the Municipal Commission, they would have found this distinction recognised by Lord Lyndhurst. Although adverse to that Commission, and especially to the composition of it, he admitted that it was "not altogether illegal," and only contended, that "*a portion of the power granted*" was illegal.¹

But this commission does not necessarily imply the exercise of any compulsory power at all. The commission confers all the power, and clothes the commissioners with all the authority, which the Crown possesses, and no more. They are to seek information by calling witnesses, by inspecting documents, and "by all *other lawful means*." Where any compulsory power lawfully exists in the Crown, they are authorised to exercise it; where they cannot compel information, they may invite it. In all cases lawful means are alone to be resorted to. If the inspection of charters or of bye-laws be considered necessary, they have the Queen's authority to ask for them; but whether the production be obligatory or optional depends on the position of the party called upon to produce. If he be a public officer of the Crown in possession of the enrolled charters of former sovereigns, it is no doubt obligatory to produce them. If he be the officer of some royal foundation which is the subject of inquiry, he could hardly venture to withhold either his testimony, or documents in his possession. If the information sought be of a more private nature, the muniments, for example, of a college endowed by a subject, the college may, in their discretion, decline to furnish it. In numerous cases the law allows a like discretion, even as against the compulsory process of the Courts; — so little ground is there for the imaginary maxim, that "the Queen cannot ask where she cannot command."²

¹ 26 Hansard, P. D. p. 314.

² These so-called compulsory clauses have been usually inserted in all such commissions, even down to the late commissions for conducting the Great Exhibition, 1851. The power to examine on oath not only officers of the Courts, but "all others," is to be found in the Common and Criminal Law Commissions, and in numerous other commissions of all sorts and of all periods. It seems to have been the clause objected to by Lord Lyndhurst in

Nor is there any great weight in the remark that an inquiry without compulsory testimony, or the sanction of an oath, may be defective and unsatisfactory. If the commissioners should solicit only partial evidence, and refuse to listen to the parties best informed or most interested, they would be justly censured, and their report would be worthless. If they solicit information from the best quarters, and such information should be voluntarily withheld, what ground have they who refuse their aid in the inquiry to complain of its imperfection? The Commission, it is true, contains no clause for administering an oath; and since the act of 5 & 6 W. 4. c. 62., the omission seems to be proper where the inquiry is not of a judicial character. But we are aware of no principle or general maxim of the Constitution that forbids the Crown, or its Ministers, or the Parliament, or either of its Houses, to be satisfied with evidence not taken upon oath in the performance of their several political or legislative functions. The ordinary foundations of legislative measures are notoriety, petitions, or public opinion; the cases, in which the solemnity of judicial proof is required, are rare and exceptional. In this and other objections the pervading error of the University counsel is, that throughout their Opinion they regard the case as one of a culprit put upon his trial; of a defendant charged with specific delinquencies and depending for his deliverance or conviction on the verdict of the commission. It is unfortunate that this view, which some of the officials of the University of Oxford have been disposed to take, has been sanctioned by the general tone of the Opinion before us. Hence, we have complaints of "false accusations without a remedy;" of evidence not upon oath; of inquiries "without the safeguards or helps" of truth; of "wrong conclusions" without "the remedy of appeal."

But it is further contended that even a commission professing to receive only voluntary testimony is, on principle,

the Corporation Commission; yet it had been sanctioned in commissions issued while his Lordship held the Great Seal. The main objection of his Lordship was, no doubt, to the persons selected as commissioners, and to the avowed object of the commission.

open to the same legal exception as the old commissions for collecting free gifts, called Benevolences.

The principle which is thus supposed to be common to the two species of commission is not very clearly indicated in the Opinion.¹ If the illegality of a privy seal or commission to solicit gifts and loans had rested upon no stronger ground than the alleged inequality of terms between the Crown and subject, or on the principle that the Crown can ask for nothing from the subject which it is not entitled to require against his will, the argument of Sir F. Bacon might have prevailed and benevolences have become parcel of the law of the land at this day. The benevolences justly condemned in the reign of James I. and Charles I. were voluntary only in name. A summons to the Council Board and commitment to the Fleet were the consequences of a refusal to contribute.² But the prohibition of this sort of taxation by repeated declaratory statutes³ is, no doubt, strong enough to extend to commissions for the levying of free gifts as well as forced loans; and the reason for making no distinction between them has a more solid basis than a mere sentiment of delicacy or an apocryphal maxim.

The principle is, that the Crown shall depend on the Parliament for its general supplies; that no general aids, taxes, or talliages, needful for the exigencies of the state, shall be sought except with the common assent of the realm expressed, not by individual Lords or Commons only, but by the Lords and Commons in Parliament assembled.⁴ Bacon was fully sensible that his opponents founded their

¹ As we may misconceive the point, we set out this part of the opinion at length. "Lord Bacon's argument referred to in the case, that voluntary benevolences might legally be solicited by the Crown, has long been exploded and condemned. The Crown and the subject are not on equal terms in such cases; and the Crown cannot constitutionally solicit against a subject that which it cannot command. And this principle seems especially true and reasonable as to an inquiry in which the subject has not the safeguards or helps which the law gives for the investigation of truth, and where he has no remedy of appeal in case wrong conclusions are drawn."

² 1 Hallam, Const. Hist. p. 32. 332. 523. ed. 1829.

³ 13 Car. 2. c. 4.; and Petition of Right, 3 Car. 1. sect. 2.

⁴ Statutes 25 Ed. 1. c. 5, 6.; 34 Ed. 1. st. 4. c. 1.; 14 Ed. 3. st. 2. c. 1. Petition of Right, 3 Car. 1.; Bill of Rights, 1 W. & M. st. 2.

condemnation of this impost on the difference between taxation by consent *in*, and consent *out of*, Parliament; but he argued that both ways were legitimate.—“God forbid,” he says, “anybody should be so wretched as to think that the obligation of love and duty from the subject to the King should be joint, and not several. No, my Lords, it is both. The subject petitions to the King in Parliament. He petitions likewise out of Parliament. . . . So, no doubt, the subject may give to the King in Parliament, and out of Parliament.”—It is precisely this substitution of the *several* wills of many for the joint and corporate consent of the whole—this machinery for superseding and evading the wholesome obligation of resorting to Parliament,—that taints with illegality the scheme for raising supplies by a benevolence.¹

If our view of the real constitutional objection to the method of taxing by voluntary benevolences be correct, it will be obvious that it is wholly inapplicable to a commission collecting mere information by lawful means. The law and constitution have provided for the Executive no other independent means of obtaining information. For the detection of crimes and delinquencies, of breaches of trust, or violations of law, there have been established many active instruments, which are not likely to let the correctional powers of the Sovereign or its representatives become dormant; but unless the Government is bound to initiate measures of public concern with no other informant or guide to rely upon than public notoriety, or is to wait till the Great Inquest of the nation shall have presented a grievance to the notice of the minister, it is not easy to conceive any less ex-

¹ Lord C. J. Coke, though evidently inimical to general commissions to collect benevolences, yet seems to countenance the acceptance of a real free-will offering to the king, 12 Co. 119. He sanctions the voluntary tax, called *Aurum Regiæ*. 12 Co. 21. During the war of the French Revolution, the tender both of loans and of personal services, in 1794, occasioned some discussion in Parliament on this point. Lord Hardwicke, C., in 1745, seems to have considered it legal to make and to accept such offers; 15 State Tri. p. 1418. But no authority, for two centuries past, warrants a commission for the purpose of urging and collecting general contributions. The test seems to be, whether there is a plain intent to alter the constitutional position of the Crown in regard to the Estates of the realm.

ceptionable means of procuring materials for useful legislation than commissions of voluntary inquiry.¹

We are not insensible that such commissions may be abused; they may be issued upon occasions that do not justify them—they may be granted for political ends to persons unworthy of confidence—they may be made the instruments of impertinent interference with rights which are strictly private—they may be sent abroad, not to inquire in good faith, but to find materials for unjust accusation. All these things may happen, as no doubt some have happened; for history affords too many instances of power abused; of essential and beneficial prerogatives perverted to serve a sinister object. But we may hope that the checks on such aberrations are now sufficiently effective to relieve us from much anxiety. No government would venture to advise a commission to inquire on matters which the Public have no right to know. If they did, the counsel for the University may rest assured that the subject would find himself in a position of no inequality with the Sovereign. We have no Star Chamber or High Commission Court; no Lauds or Bancrofts to supply the deficiencies of the common law and summon a contumacious examinant to Lambeth or the Council Board;—and the race of Cokes is not extinct. If such commissioners should transgress the limits of their lawful powers, the injured party has efficient remedies at command for his protection. If the letters patent containing their commission be *ex facie* illegal as well as prejudicial to the subject, is it certain that he must needs be dependent on the will of the Sovereign to listen to his reclamations before the Privy Council? Why not treat it like other letters patent, which the Crown has

¹ The administration of Ireland has been often regarded as the most favourable feature in the government of James I., and is noticed with praise by Hume and other historians. Some of the most remarkable instances of commissions for general inquiry in that reign are connected with that island. Davies adverts to them in his *Discovery* (ed. 1787, pp. 205, 206.) Several of a most comprehensive character, which appear to us unobjectionable in form, are printed in Rymer, vol. xvii. pp. 358, 498, 531. In the last, Sir Edward Coke is named as a commissioner. Consistently with his avowed principles, he might well have consented to act under it.

issued improvidently to the injury of a private subject, and sue out a *scire facias* to repeal them?

In the meantime, let those, who are disposed to receive the present Commission with hostility and aversion, reflect on the alternative they have escaped. No one can be so unobservant as not to perceive a growing opinion in our Legislative Assembly, especially in the House of Commons, that the great chartered Universities of Oxford and Cambridge, including their aggregated colleges, exercise too important an influence in this country to claim any exemption from public survey and control. Whether that opinion be well founded or not, we will not inquire; but, with all respect for those venerable and learned bodies, we invite them to reflect whether an investigation into their "state, discipline, studies, and revenues" before a Committee of the House of Commons is likely to be more palatable, or to be conducted with more consideration and courtesy, than an inquiry before a few gentlemen, members of one or the other of those bodies, and, we believe, personally unexceptionable? Are they aware of the vast, undefined, irresponsible, powers claimed by that assembly, and delegated to its committees? Against them there is no privilege to refuse information, or to withhold documents. Against their errors there is no security of an oath — no "safeguards and helps" for investigating truth — no appeal. In the reports of that House they may indeed be "defamed, and shall not have any traverse to it;" "unfairly accused by false evidence, and shall not have any remedy." — "O felicem Domum, quæ non impunitatem solùm adeptæ est, sed etiam accusandi licentiam!"

But we refrain from saying more on this head. We have already stated our object to be, not to discuss the propriety, or to vindicate the policy or justice, of this or any other particular commission. We only express our conviction that, unless the opinion of the law advisers of the University can be fortified by better and stronger authorities than any as yet adduced by them, the Commission must be regarded as legal and constitutional.

ART. V.—ON THE PREPARATION OF ACTS OF PARLIAMENT.

SUCH of our readers as are in the habit of referring repeatedly to the Acts of Parliament of the United Kingdom designedly in order to acquaint themselves with the existing Statute Law on subjects of legislative importance, will readily admit that they constantly become involved in a labyrinth of doubt and uncertainty; extrication from which is a task of great labour, and, often, of sheer impossibility.

The first obstacle which presents itself, and which can be only partially overcome by the aid of the printed digests and indices, is, to discover what Acts have, from time to time, been passed, either directly or more remotely, affecting the matter in hand; the next, to ascertain, by a careful collation and comparison of the statutes brought to light, which of them are wholly, and which only in part, repealed; while the problem least easy of solution is that of interpreting or attaching a certain meaning to the phraseology in which the existing enactments are expressed.

These evils are necessarily, of course to some extent, inevitable in a populous and highly civilised community, in which Legislation proceeds year by year with rapid strides, but it will not be denied that there is ample scope for improvement in the machinery of law-making; and we believe, that by a few comparatively trifling alterations in the procedure of Parliament, with reference to the mode of framing Bills for proposed Acts, a very beneficial reform might be effected in the way of rendering the Statute Books more readily accessible for purposes of reference, and the Acts themselves of less doubtful construction than they are at present.

The difficulties which we assert to be incidental to the correct ascertainment and interpretation of our Statute Law as now enunciated, are fairly enough traceable to the three following causes, viz.:—

I. Partial or piecemeal Legislation.

II. Hasty or crude Legislation.

And, III. Verbally inaccurate Legislation.

To the first of these causes, which obviously originates in the license possessed by all members of the Legislature of introducing at pleasure bills extending only to isolated cases of grievance irrespective of any attempt to render the contemplated enactments exhaustive, *per se*, of other matters properly falling within a like category, is attributable the multitude of Acts of Parliament on one and the same subject. In other words, for want of proper checks on the proceedings of the manufacturers of new laws, Bills, purporting only partially to amend or repeal antecedent Acts, are constantly allowed to pass into law; when, if due consideration were given to the subject in hand by those competent to view it correctly in all its bearings, the proposed measures would at once assume the character of Acts of *Consolidation* and Amendment in lieu of being Acts of Amendment merely.

It is certainly true, that of late years the advantages resulting from the incorporation of several pre-existing Acts in one have been recognised; but the principle of Consolidation, even when admitted, has not, in practice, been so thoroughly carried into execution as it might have been. Take, for instance, the recent Bankrupt Law Amendment Act, 12 & 13 Vict., c. 106., which is professedly an Act of Consolidation, and would have afforded a very happy illustration of the utility of the principle in question, had but its framers possessed sufficient resolution to repeal, without exception, all antecedent Bankrupt Acts, and to re-enact *in extenso* so much of them as it was their intention should still remain in force; but, unfortunately, without apparently a sufficient motive, unless the attainment of greater brevity is to be so regarded, out of the eleven statutes which are enumerated in schedule A. to the late Act, only four are wholly repealed, while the remaining seven are but partially affected, and that by way of exception, after a fashion which must almost inevitably occasion considerable difficulties of construction. Thus, in dealing with the Act 5 & 6 Vict.

c. 122., the whole is repealed, "except as hereinbefore in the Bankrupt Law Consolidation Act, 1849, is excepted, so far as *the* Act repeals any other Act or Acts, or any part of any Act or Acts; and except so far as relates to the appointment, tenure of office, and removal of additional commissioners, deputy registrars and official assignees, to act in the country, *except* so far as relates to the salaries of Commissioners, and except so far as relates to the transfer of the duties and business," &c. &c. We can but think that immunity from such a nest of exceptions within exceptions as this is would have been cheaply purchased at the expense of inserting in the body of the Act almost any number of additional clauses. In fact, it is a delusion to designate as an Act of Consolidation a statute which deals after this fashion with antecedent Acts affecting the same subject matter. Advocating, however, as we do, "Consolidation" in any shape, we do not entirely condemn the late Bankrupt Act; indeed, in many respects, it is a performance of very considerable merit. We only allege against its authors, that the principles on which it is professedly based, have been needlessly and unadvisedly sacrificed in the endeavour to obtain greater brevity in the Act itself. Any course is preferable to that of following in the beaten track of merely patching up, from time to time, the existing Statute Law, by Acts of Amendment and Extension without any attempt whatever at Consolidation. This "tinkering" process holds to a startling extent; thus, in the Act 8 & 9 Vict. c. 70., entitled "An Act for the further Amendment of Church Building Acts," no fewer than thirteen previous Acts on the same subject, and each of them, of course, more or less modified or altered by its successors, are recited, not with a view to their total repeal and re-enactment, but because "it is expedient that some of the provisions of the hereinbefore recited Acts should be amended." So, in the same Session of Parliament, an Act was passed, relative to the taking of unlawful oaths in Ireland, in which four antecedent Acts on so trifling a matter as this is, are recited and continued with amendments. Even the County Courts, notwithstanding their recent origin, are being already subjected to the process

of piecemeal legislation and its concomitant evils. The original Act, 9 & 10 Vict. c. 95., having been twice amended, viz. by 12 & 13 Vict. c. 101., and 13 & 14 Vict. c. 61., and having narrowly escaped in the last Session still more extensive additions to, and alterations in, its original provisions. And so, again, the simple matter of authorising and regulating the mode of making Government advances for the drainage and improvement of land and similar purposes, is the subject of seven lengthy Acts, six of which are partially, and only partially, repealed and amended by the last, 13 & 14 Vict. c. 31.

Instances of this kind of legislation might be multiplied almost indefinitely; and those which we have cited are not by any means the most glaring that could be brought forward; but, taken as they are, at random from a few of the late volumes of Statutes, they are amply sufficient to prove that an useless multitude of Acts on one and the same subject are permitted to continue in contemporaneous operation; and that there is proper occasion to endeavour to restrain the present usage of sanctioning Bills, the sole object of which is the partial alteration of existing Statutes, while the latter are themselves still unrepealed. Within what precise limits Bills of mere amendment should be allowed, either by reason of positive necessity, or on the ground of mere expediency, is a matter in which opinions will probably differ; but we are prepared to suggest that in no case, and under no circumstances, should any existing Act, or, at all events, any Act of a certain sessional age, be more than twice amended, unaccompanied by a total repeal and re-enactment of its provisions *in extenso*; and that even then consolidation should be regarded as the rule, and amendment as the exception; so that, in fact, in every instance where a present Statute requires alteration or extension, the onus should rest with the originator of the new Act, of showing a case for its coming within the exception and not within the rule, instead of its being incumbent on him, as it is according to the present practice, expressly to raise a case for, and prove the expediency of, consolidation. The principal objection to such an alteration in Parliamentary Procedure as that which

our suggestion implies, would, of course, turn on the increased bulk which would be thereby occasioned in the volume of the Acts passed in each Session. This objection is clearly not without weight; for no one will deny that ponderous and massive volumes of current Statutes are, in themselves, an unquestionable source of vexation and annoyance; but it will be remembered, that compensation of no small value would be afforded for the extra cost and other disadvantages attendant upon the increased bulk of the current Statutes by the conveniences of reference afforded. Facility of reference, or rather the knowledge of where a search is to begin and where it *must* terminate, is a desideratum which can hardly be sufficiently appreciated, except by those who are daily engaged in the solution of legal problems. We can well conceive that a lawyer in extensive practice would thankfully and profitably incur a very considerable present outlay to be placed in the position of knowing that his search after Statute lore must necessarily be confined within the reasonable limits of, at the most, two or three volumes, instead of feeling, as he now does, that he may be involved in a hunt from Magna Charta downwards, with no certain guide to aid him in the task of reconciling the conflicting enactments with which he is met at almost every turn.

So far, then, as the vices of our present system are traceable to what we have termed "partial or piecemeal legislation," we believe that the principal remedy to be applied consists in the reversal of the established usage which substantively admits of bills of "consolidation" in exceptional cases merely, and sanctions bills of amendment and extension without limit or restriction. To the advocates of a "Code" such a variation in the practice of Parliament must, we apprehend, appear desirable, as it would be a step, at all events, towards perfect codification, and a very material aid to the compilation of a complete Code, should that great legal reform be ever seriously undertaken.

As to the second of the heads under which we have classified the vices of our present legislative system, viz., — *Hasty or Crude Legislation*, — we imagine that no one conversant with the Statutes at large will deny that a great number of

Acts are hastily passed, which would never have become Law had their intent and object been previously more maturely considered; and that in fact the guarantees afforded against rash or crude legislation by the machinery of Committees of the whole House, and Special Committees, are insufficient and ineffectual. We purposely abstain from illustrating this branch of our subject by adducing particular instances of modern Acts of Parliament in which symptoms of inconsiderate haste are strongly apparent. No other proof is necessary than to refer to the Acts for amending other Acts of which each Session produces so long a list.

Whatever, however, may be the injurious results of the piecemeal and hasty character of our legislative procedure, they are immeasurably surpassed by the evil consequences occasioned by the total absence of security against inaccurate and careless phraseology. It may be fairly asserted that a greater portion of the time of the Courts of Law and Equity, and of Chamber Counsel, is consumed in the task of interpreting the Acts of a single Session, than would be requisite to dispose of all questions of construction arising upon *deeds* made between individuals in the course of half-a-century. Wills of course fall within a different category: they are notoriously obscure documents; and are so, partly, no doubt, in consequence of the disinclination or disability of testators to resort to professional aid; but mainly because the notion has been carefully (and we must add most injudiciously) fostered, both in and out of Parliament, that although in all reality a will is, *par excellence*, an instrument most difficult to prepare¹, yet that the illiterate and uneducated are fully competent to declare their own testamentary intentions without "consulting the lawyers."

We should not be very far from the mark, were we to

¹ It is a curious circumstance (well known, of course, to those who are initiated in the mysteries of a conveyancer's chambers) that counsel expect to be *fed* at a higher rate for preparing or settling wills and acts of parliament than any other description of legal instruments; and yet these are the particular class of documents, the preparation of which is daily undertaken by non-professional persons without scruple or hesitation!

allege that during the last Session of 1850, 1851, a full fourth of the labour of the five Equity Judges was expended in the task of construing the ambiguous provisions of the Acts relative to the Winding-up of the affairs of Joint Stock Companies, and the Lands and Railways Clauses Consolidation Acts, irrespective of numerous other modern statutes, a judicial interpretation of which was called for. We have now before us the Second Part of the first volume of Mr. Simon's new Series of Reports, and there find that out of a total number of nineteen cases reported, ten, or upwards of one-half, related to questions arising under late Acts of Parliament, or their construction.

In alluding thus, however, to the Winding-up Acts, we must not be understood as asserting that, considering the circumstances which attended their preparation, they are peculiarly deserving of condemnation in the matter of phraseology. The fact is, that in Acts of this class, dealing as they do by anticipation with the minute details and working operations of an untried scheme, it is almost impossible to be so accurate, either in substance or language, as to avoid innumerable questions of construction arising. We should be rather inclined to attribute the discrepancies which are found, to the nature of the Acts themselves, than to carelessness on the part of their authors; and this leads us to remark, that we consider it a very great vice in modern Acts of Parliament, the working of which is to be entrusted to the Courts of Law or Equity, or to other public functionaries, to attempt to make provision beforehand for ordinary matters of business routine. The true function of an Act we believe to be the enunciation of Principles of Law, while the application of those principles to individual or particular cases, and the machinery by which they are to be brought practically into play by an authorised executive, being in the one case within the province of the Judge, in the other of the Executive body, who, whether a Court or Commission, should, under reasonable checks of course, have more extensive powers than it is now usual to confer, of framing and amending, from time to time, proper working rules for

carrying out the Act with the execution of which they are entrusted.

There would seem to be no good reason why Acts of Parliament, which after all are nothing but the written contracts between the State and its subjects, should be less carefully prepared and more loosely worded than contracts between subject and subject; but that such is the fact will not admit of dispute. As we have already remarked, this unfortunate state of things is mainly attributable to the latitude allowed to members of the Legislature of framing their own contemplated measures, and the absence of regulations rendering it necessary that previously to becoming Law, Bills should undergo supervision and revisal by those whose education and pursuits qualify them to express a given idea with accuracy and propriety. If a Member of Parliament, in his private capacity, be about to enter into any important contract,—such as the sale or purchase of an estate, or the settlement of property on his marriage,—his very first step is to procure the advice and assistance of some competent solicitor and conveyancing counsel, whose energies are forthwith directed to the task of framing and settling the required documents, with that degree of perspicuity and correctness of phraseology which is essential to ensure of their being in strict conformity with, and expressive of, the terms of the contemplated arrangements; but if that very same Member, in his public character, has a fancy for legislating on any particular matter in which he considers the intervention of the Legislature called for, he will, without scruple, either himself frame an Act of Parliament for carrying out his views, or adopt and introduce such bill as may happen to be laid before him by third parties, without regard to its authorship or own intrinsic demerits; forgetting the while that if in the one case where his own private rights are at stake the guarantee of competent professional assistance is an essential, it is the more so in the other in which the interests of the whole community are concerned.

It certainly is a matter of surprise that with the vast amount of professional ability at the command of Government, and the comparative cheapness of the commodity (for the

rate of remuneration for the services of chamber counsel is anything but exorbitant¹), so few steps should have been taken to secure the benefit of the exercise of that talent in the business of settling *all* Acts of Parliament indiscriminately, but, that on the contrary, their preparation should be left almost entirely to chance medley, and the tender mercies of incompetent and indiscriminate legislators.

Even those bills which are known as Government Bills are not very much better off in this respect than those which are introduced by private members; for however active the present very able parliamentary counsel of the Home Office may be in the performance of his duties (and to the fact of his being so we bear willing testimony), it is monstrous to expect that a single individual, or, with the many other calls on their time, the Attorney and Solicitor-General, can pay that degree of attention to the preparation of the numerous proposed Government measures which is requisite to secure proper accuracy in the dry details of form and language. We believe that it is only certain classes of Government Bills which come under the notice of the Home Office counsel; and that others, though probably nominally subjected to the supervision of the law officers of the Crown, if ever attended to at all in matters of detail, are, at the most, "devilled" by some junior barrister who may happen to be on terms of

¹ Non-professional persons entertain exaggerated notions of the incomes made by barristers in full practice, whether as advocates or in chambers. The late acknowledged leader of the Conveyancing Bar—whose practice was certainly as varied and lucrative as that of any conveyancing counsel of modern times—is known never to have taken in fees in a single year more than 5000*l.*, and his income would of course have been much below that mark had it been derived solely from "drawing" or "settling." Consultations, cases, and abstracts of title are the real sources of profit to a conveyancer of repute. The labour of "drawing," or "settling," is ordinarily remunerated according to a scale of fees depending on the length of the document, the rate being one guinea for from 25 to 30 folios of 72 words each; from which it will at once be seen, that by this kind of professional exertion the draftsman must labour hard, and under favourable circumstances, to secure any thing like five guineas a day. Indeed, we have heard a very eminent conveyancer of the present day lay it down as an axiom, that, taking conveyances, mortgages, wills, settlements &c. one with another, in the order in which they usually find their way into chambers, it is not possible to realise by drafting more than three guineas on the daily average.

private friendship with either the Attorney or Solicitor-General: but however this may be, it is obviously unreasonable to expect that even the conjoint services of the Home Office counsel and the principal Crown lawyers and their assistants, rendered, as many of those services are, without fee or reward, should be really effective in the matter of revising the details of *all* Government Bills.

To legislate with propriety on any subject, a clear and definite idea of the scope and limits of the proposed measure must necessarily be presupposed to reside in its originator or promoter; but it by no means follows that he is the most fitting person to reduce that idea into the form of an Act of Parliament. The duty of suggesting a new law properly falls within the province of the Legislator; that of giving it accurate expression in legal phraseology should be the task of those who have studied and devote their lives and energies to the *science* of drafting; and the labour of drawing is one which it is out of all reason to suppose that competent persons will undertake *gratuitously*, whether the matter in hand be a Will, a Deed, or an Act of Parliament. We ask our readers unhesitatingly, whether they believe that the greater part of an entire parliamentary session would have been taken up in the discussion of the Ecclesiastical Titles' Assumption Act, had Lord John Russell and his coadjutors in the first instance possessed a clear and definite idea of the scope and limits of the measure they proposed to introduce, and had they entrusted the preparation of the Bill itself, not as a piece of fancy work, but as a really well remunerated professional task, to some of the many able draftsmen who are to be found in the ranks of our Equity and Conveyancing Bar.

Having thus, it is conceived, pretty well established our position, that the prevailing parliamentary practice relative to the mode of manufacturing or permitting the manufacture of proposed Acts, is insufficient to guard against the triple evil of piecemeal, hasty, and verbally inaccurate legislation, it remains for us only to consider what particular reformatory steps should be adopted, bearing it always in mind that the principal ends to be arrived at are:—

1st. The non-existence of a multitude of contemporaneous

and probably conflicting Acts on one and the same subject ; and, 2ndly, reasonable security that all Acts shall be accurately and unambiguously expressed.

We have already suggested that the former of these desiderata would be gained in a great measure by prohibiting Acts of Amendment unaccompanied by Consolidation, otherwise than in certain exceptional cases, while a ready and, indeed the only, efficacious means of securing the latter ; viz., accuracy in matters of form and language, appears to consist in the requirement that every bill before passing into Law should be submitted to competent professional supervision.

Such supervision is attainable either by the constitution of a Board or Commission of professional draftsmen, or by the employment from time to time, *pro re natá*, of some single counsel selected from those who by their peculiar line of practice are especially qualified to undertake a duty of this description.

To the constitution of a Board or Commission there appear to be several objections ; the principal being that habits of neglect and inattention are found to grow up in such bodies ; that two or more persons will rarely agree as to the precise form of words to be used for expressing a given idea ; that such an occupation as that of framing or settling a written document is peculiarly suited to an individual mind ; and, that the necessity of having repeatedly to appeal to the judgment or opinion of others directly tends to impede that free flow of thought which must be brought into play in the act of composing or drafting.

For these and other reasons, we are inclined to think that a Board or Commission is not the best machinery for effecting the desired object, and that, consequently, resort should be had, as occasion arises, to individual counsel, and that such counsel should be held morally responsible for the efficacy of their handiwork by the fact of the authorship of every bill being placed on record. Proceeding, therefore, on the assumption that our readers will so far coincide in our opinion, we bring this Article to a close by the following summary of the suggestions which, without in any manner pledging ourselves to their being perfect or complete, we are at present

prepared to offer on the means to be adopted, with the view of diminishing the number, and of facilitating reference to Acts of Parliament, and of rendering their provisions more consistent, intelligible, and accurate. We propose then:—

1st. That, except as presently mentioned, a prohibition be placed upon the introduction into either House of Parliament of any bill by which antecedent acts are proposed to be extended, or modified, or otherwise altered, unless the portion of acts so extended or modified, and those portions also which are intended to continue in force or unrepealed, be enacted and re-enacted, *in extenso*, in the new bill.

2ndly. That in addition to the present parliamentary counsel of the Home Office, a certain number of conveyancing counsel and special pleaders of known ability be permanently retained by Government as “standing parliamentary counsel.”

3rdly. That whenever any member of the Legislature, either in his ordinary or in a ministerial capacity, seeks for leave to introduce a bill into either House, he shall not be required to bring before the House in the first instance a copy of the bill itself, but shall be called upon merely to state the object which he proposes to attain by his contemplated measure; and shall, for the better information of the House, lay upon the table a concise printed or written summary of those objects, to be termed “proposals for a bill.”

4thly. That leave being obtained from the House to legislate with reference to the object or matter referred to by the proposals, the latter be forthwith laid, with a proper fee, before some one of the standing parliamentary counsel, as instructions for him to prepare a bill in compliance therewith.

5thly. That the member whose proposals may happen to be laid before a parliamentary counsel be at liberty to attend him in consultation from time to time for the purpose of conferring on the details of the proposed measure, and making suggestions thereon.

6thly. That each of the parliamentary counsel be invested with the right of accompanying the draft of any bill which he may prepare with such observations as may occur to him as proper for the consideration of Parliament before legislating

in the manner contemplated by the "proposals;" and that if so required, the counsel attend personally before the Committee on the Bill to afford verbal explanations respecting his written observations or the scheme or matter of the bill itself.

7thly. That all alterations made in Committee in the draft of any bill prepared in the foregoing manner be submitted, before their final adoption, to the consideration of, and *so far as phraseology merely is concerned* approved of by, the counsel by whom the bill was prepared.

8thly. That (save in cases *expressly* excepted from the operation of the general rule) it be a standing instruction to the parliamentary counsel that every bill must embody in itself, by way of re-enactment or consolidation, all antecedent acts relative to the same subject matter; and that (except as above) this instruction be in no case deviated from otherwise than under the express sanction of the House, to be obtained upon a special report, accompanied by reasons suggested by the counsel and approved of and confirmed by the Committee on the Bill.

9thly. That the general exception from the operation of the above rule as to consolidation, do not include bills relative to matters which are already the subject of two or more existing acts, or matters which are affected by any one existing act of a certain fixed sessional age.

10thly. That every bill prepared by counsel in accordance with the proposition be signed by him, and his *signature* printed on the Queen's printers' copy of the act.

And, lastly. That the expense of retaining and employing counsel for the purposes mentioned, as tending to the benefit of the community at large, be defrayed by Government, except in the case of private bills, all costs attending the preparation of which would, of course, as at present, fall upon those promoting them.

It is probable that, at some future time, we shall have occasion to recur to the subject of this Article, with the view more especially of endeavouring to promote the practice of passing Acts of Consolidation of what may be termed "common forms," and thereby, or by some other means, providing

for greater uniformity, and avoiding the necessity of the repetition at length of clauses which are of common application to all bills of a similar class or description,—an object which has hitherto been only attempted in the case of Private or Special Acts.

ART. VI.—ON THE UNION OF LAW AND EQUITY
IN RELATION TO THE COUNTY COURTS.

[To the Editor of the *Law Review*, by the Author of “Suggestions for the Reform of the Court of Chancery.”¹]

“DEAR SIR,

“IT is with heartfelt gratification that I have observed the unanimity of opinion that has lately been created among the ablest lawyers of this country, in favour of the fusion of the systems of Law and Equity. During the last year, the continued preservation of these two separate systems has been justly denounced as an anomaly and a public injury by the Reports of the Law Amendment Society, and by individual writers, whose views have been communicated to the Public through the medium of your pages and through other channels. From various enlightened and influential quarters the immediate abolition of this separation has been loudly demanded, and from the same quarters, a particular *modus operandi* has been commonly suggested; viz., the unreserved transfer to the present Assize Courts of Complete Equity Functions. Shall I be accused of temerity or presumption (while I cordially agree in the general principle), if I venture to differ altogether from the proposed method of carrying it into practical application? By you, who are personally well aware of the attention and labour I have so long bestowed on this subject, my views will be received with kindness. From the Public and from the Profession, I trust those views will,

¹ Suggestions for a Reform of the Court of Chancery by a Revision of the Jurisdictions of Equity and Law. By Arthur J. Johnes, of Lincoln's Inn, Esq. Saunders & Benning: 1834.

for the same reason, be thought entitled to a patient and courteous hearing, when I observe that it is now nearly twenty years since I published a work advocating the principle referred to, and when I add, that whatever may be the defects or demerits of the publication alluded to — its author at the time of its appearance, and long afterwards (in fact nearly up to the present time), stood alone in advocating those opinions on Law and Equity which have lately received the general approval of enlightened members of the Legal Profession. A principle may be perfectly sound in itself, and yet the plans proposed for practically applying that principle may prove experimentally unsatisfactory in operation, or even injurious. These results will, in my humble judgment, necessarily attend the actual working of the scheme for joining the Law and Equity systems in our Assize Courts.

“ There are three characteristic features, which commonly belong to Equity Suits, as distinguished from Common Law Actions.

“ 1. They frequently involve questions of account, quite unfit to be tried by a Jury.

“ 2. They very commonly embrace a long series of complicated transactions, quite unfit to be completely decided or even unravelled at a single sitting.

“ 3. They depend much more frequently (than Common Law Actions do) on mere questions of Law or Legal construction.

“ Now with regard to the feature first alluded to, and which is a very general characteristic of Equity Suits, that feature (where it occurs) is utterly destructive in practice of the efficiency of an Assize Court as a medium of decision ; for at present, all actions at Common Law depending on long accounts are uniformly referred by the Judges at Nisi Prius to arbitration.

“ With respect to the second feature above noticed, it will be obvious, that, for Equity cases presenting that characteristic, Courts held only once in half a year are utterly unsuitable.

“ With regard also to the third of the features above enumerated, it may be remarked, that to bring before a Jury questions of mere Law, must necessarily prove a source of

needless expense and vexation to the parties. In justice to a good principle, it should be tried fairly, — in other words, under circumstances unaccompanied by collateral difficulties and disadvantages. Otherwise the principle itself may be brought by an injudicious experiment into undeserved disrepute.

“ The Union of Law and Equity may be beneficially accomplished through the instrumentality of the County Courts, in which Jury Trial is the rare exception (and not the rule), and where the frequent sittings of the Judges and the services of a staff of local officers constantly on the spot and qualified to investigate accounts, are eminently calculated to facilitate the satisfactory decision of suits involving transactions requiring reiterated inquiries, under the authority and superintendence of the Court.

“ The writer of this Letter has acted as a judge of the County Courts from the period of their first establishment, five years ago, and the opinion he has thus ventured to express is the joint result of his early researches and of his later experience in the office alluded to. It is scarcely necessary to observe that there are various reasons (besides those above noticed) which render it expedient that an original Equity Jurisdiction should be given to the County Courts. The evidence of the Report recently published in favour of conferring an original jurisdiction on the Masters in Chancery, applies with far greater force in support of the proposal of extending in the same manner the powers of the Judges of the County Courts. The former proposition would, it is true, if adopted, greatly diminish the costs of many suits. But it must be remembered, nevertheless, that there are certain expenses inseparable from a system of metropolitan centralisation — expenses which would remain untouched, whether a suit may originate in a Master’s office or before one of the Judges in Chancery. That the expenses last alluded to are, as a general rule, destructive of the ends of justice in Chancery cases involving moderate amounts, is a conclusion that has been so fully discussed in your last Number, that I should consider any remarks on the subject in this Letter superfluous.

“ Increased uniformity of legal decision, as well as the

adoption of more enlightened principles of Jurisprudence, may, I venture to think, be anticipated as a consequence of the extension of Local Courts. I beg to place before you my reasons for the opinion I have just expressed.

“The County Courts have been designated *par excellence* the tribunals of the poor, and with manifest propriety, for there are no other Civil Courts in this country in which a poor man can venture to seek redress. But the appellation alluded to (however honourable to those tribunals) is calculated in some degree to create an erroneous impression with respect to other features of the institution, involving distinct advantages which have not been brought prominently under the attention of the Public. While fully recognising the benefits this jurisdiction has conferred on the humbler classes of society, I think it essential to point out that they have been advantageous (and as regards their direct effects perhaps even in a greater degree) to men of wealth and capital — to the landowner — the professional man — the merchant — and the shopkeeper. This truth will be readily apparent to any one who may take the trouble to refer to an ordinary County Courts cause list, in which he will generally find (in combination with suits by poor men for wages and for other claims) at least an equal number of actions for the recovery of rents or tenements, of professional debts, mercantile accounts, and shop debts.

“The County Courts have given to the man of wealth a security for his property and rights which he did not possess before, because, if on the one hand, poor men had been deterred by absolute want of means from suing in the Superior Courts, capitalists had been equally deterred from wasting the resources at their command on the costs of those Courts, — costs for which, generally speaking, no adequate return can be anticipated.

“In fact the benefits of the County Courts are in many respects greater in direct proportion to the amount which may be the subject of an action; in other words, those tribunals work more advantageously for a creditor who may recover 40*l.* or 50*l.*, than they do for a plaintiff who may recover 1*l.*, 5*l.*, or 10*l.*, however valuable their machinery

may be in cases of the latter class. The superior advantages conferred by a cheap and accessible tribunal, on creditors suing for large sums, are inherent in the nature of things. As the labour and loss of time of professional advocates, and of their witnesses, do not increase in relation to the amounts involved, the expenses thereby occasioned are generally far less in proportion to the value of the subject matter in litigation, in cases of magnitude, than they are in those involving small sums. The same principle applies to the costs of maintaining the Courts, and their functionaries. As the time of the Judges, County Clerks, and other officers, is not commonly occupied by large cases for periods longer in proportion to the amounts at stake, the expense of supporting those Courts is far less with reference to such cases (separately considered), than they are with reference to trifling sums and claims. Proceeding (it is presumed) on these considerations, the Legislature have fixed a relatively lower scale of Court Fees, on cases in the County Courts, for sums above 20*l.*, compared to those for sums below that amount.

“The observations I have just offered will prepare your readers for the statement that there is no part of the existing County Courts’ jurisdiction that acts better, or (as I believe) so well, as that branch of it which was created by the act of 1850, by which the authority of those tribunals was raised from the limit of 20*l.* to that of 50*l.* And yet there has rarely been a change that has been more strenuously opposed or that has been the subject of more gloomy predictions and anticipations. Not only did the Profession of the Law denounce the pending bill, but commercial men of the first eminence raised their voices against it under the influence of a panic, founded on the assumption, that the system of instalments would be applied (indiscriminately, and without due consideration by the Judges of the County Courts,) to the class of mercantile transactions (*viz.* debts of between 20*l.* to 50*l.*), this measure has brought within their jurisdiction. Experience, however, has amply shown the groundless nature of these and of similar objections, when weighed against the vast and inestimable boon of a real remedy for

claims, previously recoverable through the medium of the Courts at Westminster only. The preceding statements and remarks must, I presume, prove more efficient than any arguments I might adduce, in proof of the advantages that a progressive extension of the system of County Courts will confer on the country.

"A collateral question, however, has arisen. Will the benefits I have contemplated as the natural results of County Courts' Extension be accompanied by an increased uncertainty as regards the principles and maxims of the Law? Will the decisions of our Courts be more commonly conflicting than they are at present? I think not. On the contrary, I consider that greater uniformity in the Laws of this country — and greater consistency in the decisions of its Courts — may be expected to follow as consequences from the further extension of the County Courts, and from the changes in our forensic system, which will accompany such extension. The following are my reasons for these conclusions.

"It is undeniable that there have been very few differences of decision among the Judges of the County Courts since the first establishment of the system. I do not feel it necessary to enter at length into the reasons of this concurrence of sentiment, which is, in a great degree, attributable to the mutual communication maintained among the Judges (which though spontaneous, and founded solely on sentiments of mutual respect), has greatly tended to render their decisions consistent on points of difficulty and importance. Uniformity of judgment has also, as I believe, been greatly promoted by the publication of a monthly Periodical (the County Courts' Chronicle), devoted to subjects connected with the new Jurisdiction. Suffice it to say that, notwithstanding the large number of County Courts, the anticipation commonly entertained by the Legal Profession, that much diversity of judgment would occur in those Courts, has not been verified by the facts. There have been very few differences of opinion among the Judges; and those differences which have existed, have been, for the most, temporary only — in their nature too trifling and unimportant to unsettle the

leading principles of the Law—to render its general administration in the County Courts uncertain, or essentially to impair the large practical advantages which those Courts have conferred on the community.

“2. On the other hand, though the inflexibility of the ‘Laws of the Medes and Persians’ has been commonly attributed by the Legal Profession to the decisions of the Superior Courts, a calm and dispassionate examination of facts will serve to show that the influence of those Courts in promoting uniformity in the Law has been greatly exaggerated.

“Nothing can be farther from my thoughts than a desire to disparage the Judges of those Courts; a body to which so many eminent and illustrious individuals have belonged in our own and in former ages. But I consider it, nevertheless, most important to the ends of truth and to the progressive improvement of our Legal Institutions, that those great objects should not be sacrificed or impeded by means of the delusions of a mere ‘prestige,’ however venerable may be the individuals, or the institutions with whom that ‘prestige’ may be associated.

“In the judgments of our Superior Courts there has been much fluctuation of doctrine and opinion, both in our own times, and in those immediately preceding; and this feature has unfortunately displayed itself in a peculiarly prominent manner, when the learned Judges have had to deal with Acts of Parliament, passed with the enlightened purpose of correcting the defects and abuses of the Law.

“It is now many years since the Legislature granted a small instalment of Law Reform, by passing an Act to enable the Judges to amend slight informalities in Records, and to correct inconsistencies (not calculated to mislead the opposite party) between the pleadings and evidence of the plaintiff or defendant. Not very long after the passing of the Act, Mr. Chitty, the celebrated Pleader, addressed a letter to Lord Denman, in which he demonstrated that the Judges had virtually neutralised or repealed the Act by their decisions. The arguments of this Pamphlet were so unanswer-

able, that (combined as they were with the high authority of its author) they caused those learned persons to retrace their steps, and in their subsequent judgments, to rescind those they had previously pronounced.

“The large measure—the County Courts Act—has in many of its provisions, been frustrated and defeated in the same manner as was the small improvement—the Act empowering the Judges to amend their own Records.

“The antagonistic spirit shown by many of the Judges of the Superior Courts to the Act passed last Session, for rendering the evidence of the plaintiff and defendant admissible, will be fresh in the recollection of your readers.

“It must be borne in mind, that though they have been generally selected from the class of advocates or pleaders who have enjoyed a large practice, the judicial qualities of those learned functionaries have not always been commensurate with their previous reputation. It would, in fact, be an anomaly and a paradox were individuals (however able), who may have passed all the best years of their lives in defending the one-sided views and claims of clients (whether by advocacy in Court or by means of the subtle devices of Special Pleading) uniformly to prove (when translated to the Bench) clear-sighted, dispassionate, and efficient Judges. Still less reasonable would it be to expect such individuals (however honourable in their intentions) to become all at once liberal and zealous friends of new and enlightened laws that militate against all their habits and previous ideas.

“During the past year, the County Courts were instrumental in working a reform of the leading defect of the English Law of Evidence; for it can scarcely be supposed that Lord Brougham, notwithstanding his high claims on the attention of Parliament, would have been able to pass his Bill for rendering the evidence of the parties to suits admissible (against the opposition of the Judges of the Superior Courts and the prejudices of the Legal Profession), had it not been for the united testimony in favour of his Bill of the Judges of the County Courts, testimony founded on experience.

“As, on the one hand, the new Tribunals have served to advance reforms of the Law, so, on the other, the extension of their jurisdiction will largely contribute to the object of giving consistency and uniformity to the decisions of our Legal Tribunals.

“By those who are haunted by the apprehension that the effect of extending the powers of the County Courts to questions of greater magnitude and value, will be to introduce uncertainty and collision of judicial opinion, certain propositions are overlooked, which I shall now place before your readers.

“By the County Courts Extension Act of 1850 (which raised the jurisdiction up to 50*l.*), a power of appeal to the Superior Courts was given in cases between 20*l.* and 50*l.*

“Now this power will work better in cases above than in those below 50*l.*, because cases of the latter class will better bear the expense.

“In cases of magnitude, the cost of bringing Appeals before the Superior Courts will be comparatively trifling in relation to the interests at stake; for if suitors in cases involving 30*l.*, 40*l.*, or 50*l.*, can afford that cost, how much more advantageously may suitors in cases involving hundreds or thousands of pounds resort to the higher or appellate tribunal? Under such circumstances, it is a mere fallacy to speak of the tendency of County Courts to make the legal decisions of the country inconsistent and contradictory; for on all doubtful points there may, in cases of importance, be an appeal to a Superior Court, whose decisions will, in reality, form the sole standard of legal principles.

“The costs of a suit in the County Courts, and of an Appeal combined, are necessarily far less than those of an action brought in one of the Superior Courts.

“I conceive, moreover, that one of the consequences of the further extension of the County Courts will be to lead to the establishment of an improved Court of Appeal — of a court so constituted as to ensure in the highest possible degree the confidence of the Public and of the Profession. I anticipate that in the selection of its members it will be imperatively

demanded by the dictates of public opinion that the highest judicial qualifications should be required, and that mere success as an advocate or a special pleader should not be accepted as adequate proofs of such qualifications. To the formation of such a tribunal the appointment of men of large and enlightened minds will be indispensable; and such appointments will tend to give to the laws of this country a stability, and to their decisions a degree of harmony which they have not hitherto exhibited. While pointing out that the establishment of such an Institution will be a consequence of the further extension of the County Courts, I beg, at the same time, to state my conviction that a great deal too much weight has, in all probability, been attached to the differences of opinion on points of law that occasionally occur in our courts, for in nineteen cases out of twenty suits depend on the mere moral merits involved; and the cases in which doubtful points of law present themselves are so few as to be trifling in comparison to the great mass of litigated cases. Having thus adverted to appeals, as furnishing a more complete safeguard against a conflict of laws than any which we at present possess, it is by no means my intention to encourage the use of that privilege on the part of the suitors. On the contrary, I consider it to be a matter of congratulation that it has in so very few instances been resorted to by the unsuccessful parties to actions in the County Courts.

“I also desire to express my conviction that certiorari, or writs for the removal of causes from those Courts, in their preliminary stages, ought to be abolished. Such, in fact, is commonly believed to have been the intention of the appeal clause of the County Courts Extension Act of 1850, though it has received a different interpretation from the Court of Exchequer. I may here observe that that Court not only continues to issue writs of certiorari, but habitually grants them Absolutely on *ex parte* applications and affidavits; a practice which in more than one instance has betrayed the learned Judges of that Court into an error of serious magnitude, viz., that of ordering a certiorari, when confessedly they had no jurisdiction to do so.

" Being no friend to the spirit that magnifies the mischiefs (real or imaginary) of mistakes of a merely technical nature, not adverse to substantial justice, I may state that it is not as errors of mere Law that the decisions alluded to are, in my opinion, chiefly to be deplored. The worst consequences of those decisions consist in the direct encouragement they have given to chicanery and to perjury, the certiorari in the first instance having been obtained by direct misstatements, and in the second instance the writ was applied for within about a month afterwards, by the same attorney emboldened by success!

" In their Report recommending the establishment of Local Courts, the Common Law Commissioners state that they had felt great difficulty on the subject of an appeal; for while they conceived some appeal to be desirable, they were apprehensive that it might be made a source of unfair practices, and of costs that would frustrate the benefits of Courts, of which the essential advantage would consist in cheapness.

" Among the signatures to this Report are the names of two very eminent and able lawyers, who since its date were raised to the Bench, and have long presided in the Court of Exchequer; viz., Barons Parke and Alderson.

" It seems to have escaped the learned Commissioners that the objections alluded to apply with far less force to appeals in the strict and proper sense, (*i.e.* applications for a new hearing in a higher Court) than they do to applications to have causes removed prior to the hearing, especially to applications entertained, and finally disposed of, on *ex parte* evidence. An appeal must proceed on the real facts of a case, on which both parties must be fully and fairly heard. But the power of removal, as exercised by the Court alluded to, affords a direct advantage to the most daring misrepresentations, and (far more than appeals) inflicts on the suitor in the Inferior Court the expenses of a Superior Court, and thus deprives him of the boon of cheap redress held out to him by the Legislature.

" With reference to the subject of Bankruptcy, permit me to offer a few remarks.

" Notwithstanding the intelligent Article on the subject,

which appeared in your last Number, I must be allowed to observe, that (though the views of that Article may hold good as regards the large towns of this kingdom), I consider it certain that the main desideratum is to render the administration of the Bankrupt Laws local. To protect creditors from fraud, it is even more important to make the Bankrupt Courts accessible, than it is to give that character even to Courts for the recovery of debts; for a dishonest bankrupt may owe 10,000*l.*, and yet the bulk of his debts may consist of sums of 20*l.* or less. By accessible Bankrupt Courts the interests of commerce and far higher objects would be promoted, viz. the amendment of the Law and the improvement of the public morals.

“ Many of the present commissioners are men of large knowledge and experience. But the system over which they preside is inefficient, except with reference to the immediate neighbourhoods in which their Courts are held. To secure the punishment of fraud, and, what is more important, to promote its prevention, the complete adoption of the Local principle (which puts the poor man on a level with the rich), is especially necessary. To recover debts (where if they succeed they will be paid in full), individuals of limited means will not shrink from incurring travelling and legal expenses. But prudent men will not risk their time or their means, in going from home to resist the schemes of a dishonest bankrupt, who to dishonesty may unite utter insolvency, whether real or pretended.

“ Believe me to remain, dear Sir,

“ Yours very faithfully,

“ A. J. JOHNES.

“ P. S.— I have lately become acquainted with a case in which a Joint Stock Bank, with liabilities to the extent of several hundred thousand pounds, suddenly stopped payment. There is no probability that the bank will pay more than seven shillings in the pound. The conduct of the directors had been most fraudulent, quite equally so with that of the most un-

scrupulous projectors of bubble railways, when the mania was at its height. The bank had been originally a private one, which, when in a state of complete insolvency, was converted by the proprietors (who still continue directors) into a joint stock concern, of which they issued shares and sold them at a premium. The shares thus issued, were largely purchased by small landed proprietors, farmers, professional men, and shopkeepers; and thus in numerous instances entire ruin has been brought on private families; for these small shareholders have lost not only the purchase-money of their shares, but all they possess in life, in consequence of their liability (as partners) to make good the deficit created by the unprincipled speculations of the directors.

“ One of the directors, who has been identified with all the worst transactions of the company is now passing through the Bankrupt Court of the town to which the district in which he resided belongs; and there appears to be every probability that he will obtain his certificate, though his acts have been such as (if placed before the learned bankrupt commissioner) would undoubtedly bring upon him a long period of imprisonment.

“ You will ask, perhaps, why then has not his conduct been laid before the Bankruptcy Court? My previous remarks involve the answer to that inquiry, and I may here be allowed to recapitulate briefly the results those observations embrace.

“1. The Law of Bankruptcy involves mixed principles, viz. those both of a civil and of a criminal nature. So far as creditors seek the recovery of their debts through the medium of Bankruptcy, the redress is of the former class; when they endeavour to punish the debtor for embezzlement, speculation, or fraud, it is of the latter (*i. e.* of a criminal nature).

“ 2. Now, as regards both its objects, viz. civil and criminal all experience shows that, as a general rule, the Law of Bankruptcy will be made a dead letter by the passiveness of creditors; if they are exposed to risk and expense. Creditors will not incur costs for the sake of a doubtful dividend, nor for the purpose of inflicting punishment for offences which concern the Public at large.

"3. But on either of those objects, individuals, even of the humblest class, are commonly willing and anxious to expend liberally their mere personal trouble and exertions. Hence the necessity of an administration of the Law of Bankruptcy in the immediate neighbourhood of the bankrupt's residence.

"In the case above alluded to, the Bankruptcy Court was at a very moderate distance from the district which was the scene of the transactions to which I have above alluded. But no creditor could have interfered effectually, without sleeping from home and incurring inn expenses, — considerations which suffice in such cases to turn the balance in favour of neutrality."

ART. VII.—THE NEW PILGRIM'S PROGRESS.

CHAPTER VI.¹

VANITY FAIR.

THEN I saw in my dream that when Madam Equity and the Lady Common Law had once agreed to become united and set up house together, Pilgrim and Hopeful resolved to go on their journey. It is not to be supposed that all thought alike as to this union, and they soon found that many opposed it as adverse to their trade and pleasure; and presently, as Pilgrim and Hopeful journeyed on, they saw a town where those who opposed the union chiefly dwelt.

The name of that town is VANITY, and at the town there is a fair kept called VANITY FAIR. The fair is no new created business, but a thing of ancient standing. I will show you the original of it.

Almost one thousand years ago there were pilgrims seeking the Temple of Justice, as these two honest persons are. And Beelzebub, Feudality, and Chicanery, with their companions, perceiving by the path that the pilgrims made,

¹ See Chapters I.—III., 5 L. R. and 6 L. R.; Chapter IV., 7 L. R. 346.; Chapter V., 13 L. R. 295.

that their way to the city lay through this town of Vanity, they contrived here to set up a fair; a fair wherein would be sold all sorts of vanity, and that it should be held more especially four times a year: therefore at this fair are all such merchandise sold as houses, lands, places, honours, preferments, titles, judgeships, peerages, maces, baubles, wigs, chancellorships, purses, coronets, bags, sinecures, lusts, pleasures, silver, gold, and what not.

And, moreover, at this fair there are at all times to be seen jugglings, special pleas, quirks, cheats, legal fictions, false pretences, games, plays, fools, apes, Queen's counsel, barristers, crotchets, conveyancers, knaves, rogues, attorneys, solicitors, and that of every kind.

Here, also, there are to be seen, and that for nothing, thefts, murders, adulteries, false swearers, and that of a blood-red colour.

And, as in other fairs of less moment, there are several rows and streets under their proper names, where such and such wares are vended, so here, likewise, you have the proper places, rows, and streets where the wares of this fair are soonest to be found. Here is the Equity or Chancery Row, the Queen's Bench Row, the Common Pleas Row, the Exchequer Row, the Masters' Row, the Benchers' Row, where several sorts of vanities are to be sold. But, as in other fairs, some one commodity is the chief delusion of all the fair, so the ware of Feudality, called commonly Conveyancing, and her merchandise, is greatly promoted in this fair; only the country, with some others, have taken a dislike thereat.

Now, as I said, the way to the Temple of Justice lies just through this town where this lusty fair is kept; and he that will try to get any Justice, and yet not go through one of these rows, must needs go out of the world.

Now these pilgrims, as I said, must needs go through this fair. Well, so they did; but behold, even as they entered into the fair, all the people in the fair were moved, and the town itself was as it were in a hubbub about them, and that for several reasons; for,

First, the pilgrims were clothed with such kind of raiment

as was diverse from the raiment of any that traded in that fair. The people, therefore, of the fair made a great gazing upon them: some said they were fools; some they were bedlams; and some, not knowing what to say, that they were outlandish men and dilettanti.

Secondly, and as they wondered at their apparel, so they did likewise at their speech, for few could understand what they said; they naturally spoke the language of common sense, but they that kept the fair were men of the law, and hardly knew a word of it; so that from one end of the fair to the other they seemed barbarians each to the other.

Thirdly. But that which did not a little amuse the merchandisers, was that these pilgrims set very light by all their wares; they cared not so much as to look upon them, and if they called upon them to buy, they would put their fingers in their ears, and cry, "Turn away mine eyes from beholding your Law and Equity, which is vanity," and look upwards, signifying that their trade was for Justice.

One chanced, mockingly, beholding the carriages of the men, to say unto them, "What will you buy;" but they, looking gravely upon him, said, "We buy the truth." At that there was an occasion taken to despise the men the more, some mocking, some taunting, some speaking reproachfully, and some calling upon others to smite them. At last things came to a hubbub, and a great stir in the fair, inso-much that all order was confounded. There was word presently brought to the great one of the fair, who lived in a large building in Chancery Row, who quickly came down, and deputed some of his most trusty friends to take these men into examination, about whom the fair was almost overturned. So the men were brought to examination; and they that sat upon them asked them whence they came, whither they went, and what they did in such an unusual garb? The men told them they were pilgrims and strangers in the world; that they were on their way to the Temple of Justice, and that they had given no occasion to the men of the town, nor yet to the merchandisers, thus to abuse them, or to let them in their journey, except it was for that when one asked them what they would buy, they said they would "buy the

truth." But they that were appointed to examine them did not believe them to be any other than bedlams and mad, or else such as came to put all things into a confusion in the fair. Therefore they took them, and beat them, and besmeared them with dirt. They then dragged them to their idol, Chicanery, whose image was set up in the large building in Chancery Row, and was there worshipped, and by these merchandisers called Justice, and they would fain make the men fall down and worship it. But this the men would not do. They then put them to the torture. But the men being patient and not rendering railing for railing, but giving good words for bad, and kindness for injuries done, some men in the fair that were more observing and less prejudiced than the rest, began to check and blame the baser sort for their continual abuses done by them to the men. They therefore, in angry manner, let fly at them again, counting them as bad as the men they defended, and telling them that they seemed confederates, and should be made partakers of their misfortunes. The others replied, that for aught they could see the men were quiet and sober, and intended nobody any harm, but rather good. Thus after divers words had passed on both sides (the men behaving themselves all the while very wisely and soberly before them), they fell to some blows among themselves. But Pilgrim and Hopeful behaved themselves yet more wisely, and received the ignominy and shame that was cast upon them with so much meekness and patience that it won to their side (though but few in comparison to the rest) several of the men of the fair, and even some who lived in the great building in Chancery Row. This put the other party into a greater rage, and the men were sent to the cage, and their feet were made fast in the stocks.

Here also Pilgrim called to mind what he had heard from his friend Gilead, and had recourse to the elixir which had been given him by that good spirit.

Then a convenient time being appointed, they brought them forth to their trial, in order to their condemnation. When the time was come they brought them before their enemies, and arraigned them. The Judge's name was Lord

Hategood, their indictment was one and the same in substance, though somewhat varying in form; the contents whereof were thus:—

That they were enemies to, and disturbers of the trade; that they had made commotions and divisions in the town, and had won a party to their own most dangerous opinions, and set up a Society in opposition to the law of the Prince.

Then Hopeful began to answer that he had only set himself against that which had set itself against Justice. "And," said he, "as for disturbance, I made none, being myself a man of peace; the parties that were won to us were won by beholding our truth and innocence, and they are only turned from the worse to the better; as to the Society it was a Society for Promoting the Truth; and as to the Prince you talk of, since he is Beelzebub, the enemy of all justice, I defy him and all his angels."

Then proclamation was made that they that had aught to say for their lord the King against the prisoner at the bar should forthwith appear and give in their evidence. So there came in three witnesses, Envy, Mummery, and Pickthank. They were then asked if they knew the prisoner at the bar, and what they had to say for their lord the King against him.

Then stood forth Envy, and spoke to this effect. "My Lord, I have known this man a long time, and will attest upon my oath, before this honourable Court, that he neither regardeth law nor custom; but doeth all that he can to possess all men with his notions, which he in general calls 'principles of truth and justice,' and, in particular, I heard him once affirm that true Equity and the customs of Chancery Row were diametrically opposite, and could not be reconciled. By which sayings, my Lord, he doth at once not only condemn all our laudable doings, but us in the doing of them, and thus injures our trade with the public. So also he reviles my Lord Feudality, and says his adherents have no right to live on the land, and to prevent its getting out of their hands. Nay, as to our chief ware, Conveyancing, he does not scruple to say that it is a cunning in-

vention, and that it would be well for this country if the land were rid of it altogether."

Then did the Judge say to him, "Hast thou any more to say?"

Envoy.—"My Lord, I could say, only I would not be tedious to the Court. Yet, if need be, when the other gentlemen have given in their evidence, rather than anything should be wanting that will dispatch him, I will enlarge my testimony against him." So he was bid to stand by.

Then they called Mummery, who began, "My Lord, I have no great acquaintance with this man, nor do I desire to have further knowledge of him; however, this I know, that he is a very pestilent fellow, from some discourse that the other day I had with him in this town; further talking with him, I heard him say that our justice was nought. Which saying of his, my Lord, your Lordship very well knows what necessarily will thence follow, to wit, that no one will come to your Lordship's building; but, on the contrary, the merchandizers will not be able to sell their wares, and the building will be deserted, and another kind of justice will be called for."

Then was Pickthank sworn. "My Lord," said he, "and you gentlemen, as to this fellow, I have known him a long time, and have heard him speak things that ought not to be spoken, for he hath railed on our noble prince Beelzebub, and hath spoken contemptuously of his honourable friends whose names are the Lord Feudality, the Lord Lovefee, the Lord Tautology, the Lord Desire of Vain Glory, and Sir Having Greedy, with all the rest of our nobility; and he hath said, moreover, that if all men were of his mind, if possible, there is not one of these noblemen should have any longer a being in this town. Besides, he hath not been afraid to rail on you, my Lord, who are now appointed to be his judge, calling you an ungodly villain, with many other such like vilifying terms, with which he hath bespattered most of the gentry of our town."

When this Pickthank had told his tale, the Judge directed his speech to the prisoner at the bar, saying, "Thou runagate,

heretic, and traitor, hast thou heard what these honest gentlemen have witnessed against thee ? ”

Hopeful.—“ May I speak a few words in my own defence ? ”

Judge.—“ Sirrah ! sirrah ! thou deservest to live no longer, but to be slain immediately in the place ; yet that all men may see our gentleness towards thee, let us see what thou hast to say.”

Hopeful.—“ I say then, in answer to what Mr. Envy hath spoken, I never said aught but this, that what rules, or laws, or customs, were flat against common sense, are opposite to ustice. If I have said amiss in this, convince me of my error, and I am ready to make my recantation. As to the second, Mr. Mummery, and his charge against me, I said only this, that justice ought to be sure, cheap, and speedy, and that whatever is contrary thereto is injustice, and ought to be corrected. As to what Mr. Pickthank has said, avoiding terms, as that I am said to rail, and the like, I said that the Prince of this town, with all the rabblement his attendants, by this gentleman named, are more fit for being in hell than in this town and country ; and so the Lord have mercy upon me.”

Then the Judge called to the Jury (who all this while stood by to hear and observe). “ Gentlemen of the Jury, you see this man about whom so great an uproar hath been made in this town ; you have also heard what these worthy gentlemen have witnessed against him, also you have heard his reply and confession. It lieth in you either to hang him, or save his life : but hanging is too good for some men. The constant practice and custom of our honourable profession with such fellows as this has been to starve them, and you will see whether this does not meet the justice of this case.”

Then went out the Jury, whose names were Mr. Blindman, Mr. Nogood, Mr. Malice, Mr. Copymoney, Mr. Shamplea, Mr. Heady, Mr. Highmind, Mr. Enmity, Mr. Liar, Mr. Cruelty, Mr. Hatelight, and Mr. Implacable, who every one gave in his verdict against him among themselves, and afterwards unanimously concluded to bring him in Guilty before the Judge. And first Mr. Blindman, the foreman, said, “ I see clearly that this man is a quack.” Then said Mr. Nogood,

"Away with such a fellow from the earth." "Aye," said Mr. Malice, "for I hate the very looks of him." "Yes," said Mr. Copymoney, "he was always preventing my gains." "True," said Mr. Shamplea, "and circumventing my justice." "Starve him! starve him!" said Mr. Heady. "A sorry scrub!" said Mr. Highmind. "My heart riseth against him!" said Mr. Enmity. "He is a rogue!" said Mr. Liar. "Hanging is too good for him!" said Mr. Cruelty. "Let us despatch him out of the way!" said Mr. Hatelight. Then said Mr. Implacable, "Might I have all the world given me I could not be reconciled to him, therefore let us forthwith bring him in guilty of death." And so they did. Therefore he was presently condemned to be led from the place where he was, to the place from whence he came, and then to be put to the most cruel death that could be invented.

They therefore brought him out to do with him according to the laws; and first they scourged him, then they buffeted him, then they railed at him, and at last they carried him up to the highest part of a place they called the Temple, and left him there to be starved to death. Thus came Hopeful to his end.

But as for Pilgrim, he had some respite, and was remanded back to prison. So he there remained for a space; but He that overrules all things, having the power of their rage in his own hand, so wrought it about that Pilgrim for that time escaped them, and went his way.

ART. VIII. — PARLIAMENTARY OATHS.

THE case in which the liability of Mr. Alderman Salomons to the penalties imposed by the 1 Geo. 1. st. 2. c. 13., for voting in the House of Commons without having first taken the oaths enjoined by law, has been brought into question, has just been submitted to the consideration of the Court of Exchequer — probably to be carried thence to the House of Lords — in the form of a special verdict. In a matter of so much constitutional importance and legal interest, we make no apology for stating briefly the grounds on which we have come to the conclusion that Mr. Salomons has not infringed the law.

In the first place, it is abundantly clear, and indeed has not been seriously questioned by anybody during the recent discussions in and out of Parliament, except perhaps by Sir Robert Inglis, that by the Common Law of England, an oath administered to any person in a Court of Justice, either in a civil or a criminal proceeding, according to the form which he considers and declares to be binding upon his conscience, is duly and properly administered, so that the violation of it by giving false testimony would legally subject him to the penalties due to perjury. "As the object of the oath," says Mr. Starkie¹, "is to bind the conscience of the witness, it follows that some form of swearing must be used which the witness considers to be binding; and therefore every witness is now sworn according to the form which he holds to be the most solemn, and which is sanctified by the usage of the country or of the sect to which he belongs. A Jew is sworn upon the Pentateuch" (with his hat on), "and Turk upon the Koran; so it has been held that a Scotch Covenanter may be sworn according to the form of his sect, by holding up his hand, without kissing the book."²

¹ Stark. Evid. vol. i. p. 21.

² See *Dutton v. Cole*, 2 Siderfin, 6.; *Omychund v. Barker*, 1 Atkyns, 21.; *Rex v. Mildrone*, 1 Leach's Cr. C., 459.; *Mee v. Read*, Peake's N. P. C., 23.; *Reg. v. Entrehman, Carr. & M.*, 248; and other cases.

“ Upon the principles of the Common Law,” says Lord Mansfield¹ (referring to the case of *Omychund v. Barker*, in which a *Gentoo* was admitted to be sworn according to the ceremonies of his religion) “ there is no particular form essential to an oath to be taken by a witness ; but as the purpose of it is to bind his conscience, every man of every religion should be bound by that form which he himself thinks will bind his own conscience most. Therefore, though the Christian oath was settled in very early times, yet Jews, before the 18th of Edward the First, when they were expelled the kingdom, were permitted to give evidence at Common Law, and were sworn, not on the Evangelists, but on the Old Testament.”²

“ It were a very hard case,” says Lord Hale, “ if a murder committed here in England, in presence only of a Turk or a Jew, that owns not the Christian religion, should be dispunishable, because such an oath should not be taken which the witness holds binding, and cannot swear otherwise, and possibly might think himself under no obligation, if sworn according to the usual style of the Courts of England.”

The Roman law concurred with this doctrine ; and it appears from Selden³, that the ceremony used by Christians, of kissing or touching the sacred volume, in taking an oath, was borrowed by them from the usage amongst the Pagans, who “ *sacris ac mysteriis suis aut tactis aut præsentibus jurari solebant* ;” and that in the times of the earliest Roman Emperors who were converts to Christianity, Christians, as well as those who continued Pagans, swore according to their fancy, without any particular form even of words, as “ *per vultum sancti Lucæ*,” “ *per pedem Christi*,” or “ *per sanctum hunc et illum*.” So Grotius says⁴, “ *Forma jurisjurandi verbis differt, re convenit ; hunc enim sensum habere debet, ut Deus invocetur, puta hoc modo, Deus testis sit, aut Deus vindex, quæ duo in idem recidunt*.”

¹ *Atkinson v. Everitt*, Cowper, 389.

² See Selden, vol. ii. p. 1469. ; Madox's *History of the Exchequer*, 166. ; Wilkinson's *Saxon Laws*, 348. From the last of these authorities it is clear that in Saxon times Jews sat on juries.

³ *Pleas of the Crown*, vol. ii. p. 279.

⁴ Vol. ii. p. 1467. See Voet, on *Dig.*, lib. 12. tit. 2. s. 2.

Acting, we presume, upon these considerations, the House of Commons, in the session of 1850, after a discussion of the question at such length and of such a character as certainly would not at this day have been endured elsewhere, determined, in spite of the authority of Lord Coke¹, that "an alien born cannot be a witness, which is to be understood of an *alien infidel*,"² and of the opposition of Sir Frederic Thesiger, that the Baron de Rothschild was entitled to take the oaths on the Old Testament. The subsequent proceedings in his case are notorious. But in the session of 1851 Mr. Alderman Salomons forced upon the consideration of the House the further question, whether the Oath of Abjuration was well taken by a Jew, omitting the words "upon the true faith of a Christian," and accompanying the oath with a declaration that he had taken it in the form and with the ceremonies which he declared to be binding on his conscience. And it is in consequence of his having sat and voted after the determination of the House in the negative that it is now sought to subject him to penalties.

In the consideration of this question, it becomes necessary to refer, not only to the principle of the Common Law already stated, but also to the provisions of the several statutes which have prescribed the oaths to be taken by Members of Parliament on their admission to the House, as well as by other civil functionaries on their admission to office.

These oaths are three,—the Oaths (as they are styled) of Allegiance, of Supremacy, and of Abjuration. The Oaths of Allegiance and Supremacy have subsisted in their present form since the Reformation. It is in the Oath of *Abjuration* only that the words "upon the true faith of a Christian" occur. That oath is in the following terms, as administered to all but the Roman Catholic members of the Legislature:—

¹ 4 Inst. 279.

² A century later, Lord Holt, when at the bar, argued successfully before Lord Chief Justice Jeffreys, that the King's subjects had no right to hold commercial intercourse with infidels. Case of monopolies (*East India Company v. Sandys*), Skinner, 198., and in other Reports.

"I, *A. B.*, do truly and sincerely acknowledge, profess, testify, and declare, in my conscience, before God and the world, that our Sovereign Lady Queen Victoria is lawful and rightful Queen of this realm, and all other her Majesty's dominions and countries thereunto belonging. And I do solemnly and sincerely declare, that I do believe, in my conscience, that not any of the descendants of the person who pretended to be Prince of Wales during the life of King James the Second, and since his decease pretended to be and took upon himself the style and title of King of England, by the name of James the Third, or of Scotland by the name of James the Eighth, or the style and title of King of Great Britain, hath any right or title whatsoever to the Crown of this realm, or any other the dominions thereunto belonging. And I do renounce, refuse, and abjure any allegiance or obedience to any of them. And I do swear that I will bear faith and true allegiance to her Majesty Queen Victoria, and her will defend to the utmost of my power against all traitorous conspiracies and attempts whatsoever which shall be made against her person, crown, or dignity. And I will do my utmost endeavours to disclose and make known to her Majesty and her successors all treasons and traitorous conspiracies which I shall know to be against her or any of them. And I do faithfully promise, to the utmost of my power, to support, maintain, and defend the succession of the Crown against the descendants of the said James, and against all other persons whatsoever, which succession, by an act intituled 'An Act for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject,' is and stands limited to the Princess Sophia, Electress and Duchess Dowager of Hanover, and the heirs of her body, being Protestants. *And all these things I do plainly and sincerely acknowledge and swear, according to these express words by me spoken, and according to the plain common sense and understanding of the same words, without any equivocation, mental evasion, or secret reservation whatsoever. And I do make this recognition, acknowledgment, abjuration, renunciation, and promise, heartily, willingly, and truly, upon the true faith of a Christian.* — So help me God."

Now, waiving altogether the consideration that this abjuration was directed against the pretensions of persons who have now been utterly extinguished by time, let us inquire what has been the course of the Legislature as to an abjuration of pretenders to the crown and enemies to the sovereign, the

objects against which it has been directed, and the limitations by which it has been accompanied.

The first oath of this nature was imposed by the 3 Jac. 1. c. 4. s. 14., enacted on the discovery of the Gunpowder Treason. That act is entitled "An Act for the better discovering and repressing of *Popish Recusants*," and is one of several statutes directed entirely against Papist conspiracies. The oath, besides a general declaration of fidelity in nearly the same terms as are now incorporated in the Abjuration Oath, contains also the substance of the Oath of Supremacy, and concludes with precisely the same words as we have above printed in italics, which from that time downwards have been repeated in every Oath of Abjuration.

By the 25 Car. 2. c. 2., "An Act for preventing Dangers which may happen from *Popish Recusants*," it was enjoined, that all persons who should bear any offices or places of trust under the Crown should, within a time thereby limited, take "the several oaths of supremacy and allegiance (*which oath of allegiance* is contained in the statute made in the third year of King James) by law established," and should also subscribe a declaration against the truth of the doctrine of transubstantiation.

Upon the accession of William the Third, the only oaths required by the Act of Recognition (1 Will. & M. sess. 1. c. 8.), and the Act of Settlement (1 Will. & M. sess. 2. c. 2.), were the Oaths of Allegiance and Supremacy, in the form in which they are now administered. But at the close of that reign, when, on the death of James II., the recognition by Lewis XIV. of the hereditary claim of the Pretender to the Crown aroused again the alarms of the nation, that personage was attainted of treason, and the Oath of Abjuration, substantially in the same terms as at present, except that it applied to the Pretender himself and not to his descendants, was required to be taken by all peers and members of Parliament before sitting or voting, and by all persons holding offices under the Crown within a limited time (13 Will. 3. c. 6.). During the period of thirteen years, therefore, which elapsed from the Revolution to the year 1701, the date of the last-mentioned statute, no Oath of Abjuration — no oath

containing the words "upon the true faith of a Christian"—existed at all by law, and during that interval Jews were, to all intents and purposes, for aught that the Legislature had declared to the contrary, as capable of holding office under the Crown, as capable of sitting and voting as members of parliaments, as any subjects of the realm were at any period of our history.

Now it is perfectly clear that the several statutes of James I., Charles II., and William III., to which we have referred, were not enacted with any reference whatever to any distinction between Christians and Infidels. They were passed altogether *alio intuitu*. They were directed against real or apprehended dangers to arise from the divided allegiance of *Papists*; in the year 1605, upon the terrors excited by the discovery of the Gunpowder Treason; in the year 1673, on the alarm created by Charles II.'s Declaration of Indulgence, for the suspension of penal laws against the Roman Catholics; in the year 1701, on the apprehension of invasion by France with the object of placing the Papist heir of the Stuarts on the throne. And the words "upon the true faith of a Christian" were introduced with the sole design of preventing the operation of that mental reservation and equivocation with which it was supposed that Roman Catholics, under dispensation from sacerdotal authority, might swear one thing and intend another.

On the accession of Queen Anne¹, and subsequently on that of George the First², the Oaths of Allegiance, Supremacy, and Abjuration were enacted anew, the last being varied only by the substitution of the name of the reigning for that of the deceased sovereign. After the suppression of the rebellion of 1715, an act was passed (1 Geo. 1. st. 2. c. 55.) by which, after reciting that the papists within the kingdom, notwithstanding the toleration and protection they had enjoyed, "had not only, all or the greatest part of them, been concerned in stirring up and supporting the late unnatural rebellion," but also "took themselves to be obliged, by the principles they professed, to be enemies to his Majesty, and

¹ 1 Ann. s. 1. c. 22.

² 1 Geo. 1. s. 2. c. 13.

watched for all opportunities of fomenting new rebellions and disturbances within the kingdom, and of inciting foreigners to invade it," all persons in England, having any interest in lands, and professing the Popish religion, were required, amongst other things, on pain of the forfeiture of their lands, to take, within a time thereby limited, the oaths appointed by the statute 1 Geo. 1. st. 2. c. 13., or to register their names and lands at the quarter sessions. The time allowed for this purpose was enlarged by subsequent acts: 3 Geo. 1. c. 18., 9 Geo. 1. cc. 18. and 24.; the period limited by the last of these being the 25th Dec. 1723.

By the 5th Geo. 1. c. 29., "An Act for making more effectual the Laws appointing the Oaths for Security of the Government to be taken by Ministers and Preachers in Churches and Meeting-houses in Scotland," persons who had already obtained licenses to preach in Scotland, and had not taken the oaths to the Government, or who, after the 1st of June, 1719, should present themselves to be licensed, were required to take the oath therein set forth, which is the abjuration oath imposed by the 1 Geo. 1., *without the words "upon the true faith of a Christian."* The same omission occurs in the affirmation to be made by Quakers instead of the oath of abjuration, as prescribed by the 8 Geo. 1. c. 6.

By the 9 Geo. 1. c. 24., professing papists *in Scotland* were also placed under the like obligation as the same persons in England had been by the 1 Geo. 1. st. 2. c. 55., of taking within a limited time (by 25th March, 1724,) the oaths to the Government, or registering their names and real estates. Then came the 10 Geo. 1. c. 4., whereby, after reciting the requisitions of the 9 Geo. 1. c. 24. (which, it will be observed, applied to the Roman Catholics both in England and in Scotland); and that by reason of the shortness of the time allowed for complying with those requisitions, many persons had been prevented from taking the oaths, and the time limited for taking them in Scotland had been found not to be sufficient; the time was further enlarged, as well for England as for Scotland, to the 28th Nov., 1724. Various provisions follow, relating to the manner and form of registration, the penalties on breach of the act of parliament, &c.;

and afterwards comes this clause (s. 18.) relating specially to Jews:—

“ And whereas the following words are contained in the latter part of the Oath of Abjuration, viz., ‘ upon the true faith of a Christian,’ be it further enacted, that whenever any of his Majesty’s subjects professing the Jewish religion shall present himself to take the said oath of abjuration, in pursuance of the said recited act or of this present act, the said words, ‘ upon the true faith of a Christian,’ shall be omitted out of the said oath in administering the same to such person; and the taking the said oath by such person professing the Jewish religion, without the words aforesaid, *in like manner as Jews are admitted to be sworn to give evidence in courts of justice*, shall be deemed to be a sufficient taking of the abjuration oath within the meaning of this and the said recited act.” By a subsequent statute, 13 Geo. 2. c. 7., (for naturalising foreign Protestants and others settling in the British colonies in America), enacting that foreigners who have lived for seven years in any of the colonies in America, and who shall take the oaths prescribed by the 1 Geo. 1. st. 2. c. 13., shall be deemed to be natural-born subjects of Great Britain, a like saving is introduced in favour of the Jews; namely, “ that whenever any person professing the Jewish religion shall present himself to take the said Oath of Abjuration in pursuance of this act, the said words, ‘ upon the true faith of a Christian,’ shall be omitted, &c.; and the taking and subscribing the said oath by such person professing the Jewish religion, without the words aforesaid, and the other oaths appointed by the said act, in like manner as Jews were permitted to take the oath of abjuration by an act made in the tenth year of the reign of his late Majesty King George the First, &c., shall be deemed a sufficient taking of the said oaths, in order to entitle such person to the benefit of being naturalised by virtue of this act.”

The only other statute which it is necessary to mention here is the 6 Geo. 3. c. 53., by which, on the death of the old Pretender, the form of the Abjuration Oath was settled as it is now administered.

In the debates of the last session, the enactment of the

10 Geo. 1. c. 4. was appealed to as an authority on both sides of the question. Sir Frederic Thesiger inferred from it, in the first place, that the introduction of such a clause showed that the protection given by it did not exist by law without it; and he then contended, that its operation being in terms confined to the temporary occasion for which alone the act was made — the subscription of the oaths by persons who should come in within the time thereby limited for the purpose, — when that occasion had gone by, it left the general law in this respect as it found it. But we conceive that the true view of this statute, and of the 13 Geo. 2. c. 7., which refers to and adopts the principle embodied in it, is that which was maintained by Mr. Bethell; namely, that it is a *legislative declaration* that the principle of the Common Law, by which a Jew, sworn according to the form of his faith, which he deems binding on his conscience, is a good witness, shall apply equally to the oath of abjuration; and that words which constitute no part of the engagement contained in that oath shall no more be allowed to harass and perplex the conscience of persons to whom they had no relation, or the judgment of those before whom the oath shall be taken, than the want of the ceremonies accompanying the Christian oath shall be permitted to invalidate the oath of the Jew in a court of justice. The argument in favour of the legal necessity of an enactment from the mere fact of its having been made is always of little value; in this case it appears to us to be of no value at all. The “abundant caution” of the Legislature might well declare, without any legal necessity for so doing, that a certain form of words was not, in a certain case, an essential part of the oath, which form might otherwise be a stumbling-block in the way both of him who had to take and of him who had to administer it.

The matter then stands thus: — Every subject of this realm, whether Christian or infidel, is, by the Common Law of the realm, entitled to make oath in the form and with the ceremonies which, according to his religion, he holds binding upon his conscience. Statutes are passed, with the sole object of imposing upon a particular sect of Christians, whose fidelity is in question, but who can have no objection to swear upon the true faith of a Christian, the necessity of

taking an oath in a certain form, supposed to be a security against the mental reservation and equivocation from which they might be absolved by their ecclesiastical superiors. Other statutes declare (upon special occasions no doubt) that this form of words, or a part of it, shall not apply to other sects of Christians with respect to whom such a security is not needed, or to Jews, to whom the form is wholly inapplicable, and to whom it was never intended to apply. Yet it is now to be held binding upon Jews, in derogation of the Common Law, in spite of the unquestionable fact that the Legislature never contemplated or professed thus to bind them, notwithstanding the clear declaration (as we consider it) of the Legislature, on more than one occasion, that it did not intend any such unjust and repugnant consequence, and although it is not *now* demanded even from the sect of Christians in respect to whom alone it was originally imposed.

In this state of things, Lord Denman's Act, the 1 & 2 Vict. c. 105., has been enacted. It is in terms and in intention declaratory of the pre-existing law: — "Be it declared and enacted, that in all cases in which an oath may lawfully and shall have been administered to any person, either as a jurymen or a witness, or a deponent in any proceeding, civil or criminal, in any Court of Law or Equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

"In such form and with such ceremonies." Surely this means, in such *form of words*, and with such *outward ceremonies*, as the swearer may declare to be binding. What, then, is the substance, and what the form, of the oath in question? The *substance* is the engagement by which the subject binds himself, that he denies and abjures the supposed claims of the descendants of the Pretender, that he will bear

true allegiance to the Queen, that he will defend her from all traitorous conspiracies, and that he will maintain the Protestant succession as limited before the accession of the House of Brunswick. The *form* is, the obtestation of the Godhead, and the declaration that the oath is taken according to its plain words and sense, without equivocation, mental evasion, or secret reservation, and upon the true faith of a Christian, when a Christian swears it. The outward ceremonies are, the swearing on the Gospels or on the Old Testament, with the hat on or with the hat off, by holding up the hand with the book opened before the witness instead of kissing it, by breaking a saucer against the witness box, by touching the foot of a Brahmin.

We have taken leave to pass by altogether the argument, if it can be called such, which supposes that the oath of abjuration must be taken in full by all members of Parliament, because ours is a "Christian Legislature." We might as well be told that ours is a Christian army, or that ours is a Christian Bar. It is a Legislature representing, and making laws for the government of, all the Queen's subjects, Christians both real and professing, Jews, Turks, infidels, and heretics. But we have no desire to pursue such a discussion, nor the presumption to attempt to tread in the steps of Mr. Macaulay.

Upon the whole matter our conclusion is, that notwithstanding the statutes, the Jew still enjoys in this respect, in common with his fellow-subjects, the benefits of the Common Law, which Common Law Mr. Alderman Salomons has not infringed.

ART. IX. — JUVENILE OFFENDERS: PREVENTIVE AND REFORMATORY SCHOOLS.

THE public mind is at length becoming awake to the condition of those of our Juvenile population, who, year after year, are committed and re-committed to the prisons of the country; and the question is being asked on all sides

whether it would not be more Christian and more just, and less expensive also, to adopt some other mode of treating juvenile crime than at present prevails. By the last Report of the Inspectors of Prisons it appears, that the number of juvenile offenders under seventeen years of age, committed for trial at the Assizes and Quarter Sessions during the year 1849 amounted to 2904; the summary convictions for the same period amounted to 10,251; giving a total of 12,955. Of these as many as 4314 were re-committals, and 761 had been committed *four times and upwards*. Alarming figures truly, but they by no means show the real amount of crime committed by the young. Those who have paid any attention to the subject know that in all our large towns the detection and punishment of criminals bear but a small proportion to the amount of crime committed. "I have been one of the luckiest thieves in London. I have been let off sixteen times at the police station and up at the office together, and I was guilty every time," said a young lad to the master of a reformatory school; and this we believe to be no exaggerated statement of the degree of impunity which a London thief experiences. If we multiplied the above figures by ten, therefore, we should not over-estimate the number of offences annually committed by our juvenile population.

The class of children who supply this terrible amount of crime is well known. Their numbers, also, have been calculated. To use the words of the present Earl of Shaftesbury, whilst a member of the House of Commons, "this class,—namely, the naked, filthy, roaming, lawless children who form what may be called the seed-plot of nineteenth-twentieths of the crime which desolates the metropolis,—are not fewer than thirty thousand." Whilst, then, in this most wretched nursery our juvenile offenders are gradually and often most systematically trained up, so do these in their turn, after having received the education which the gaol gives them, supply the ranks of our adult criminal population with their most daring and reckless members. So long as our present system of criminal punishment prevails this must be. A child, say of nine or ten years of age, is brought be-

fore a magistrate upon a charge of attempting to pick pockets: it is his first offence, perhaps; he has not yet learned his art. The charge is established, and the child is sent to prison for a month. At the expiration of that time,—having cost the country the expense of his apprehension, prosecution, conviction, and his month's maintenance,—he issues forth from the prison; the terror he once felt for it diminished, if not entirely gone, finds his way to his home, where a profligate parent is ready, perhaps, again to urge him forward in crime; or, if he have no home, rejoins his former companions; in either case to continue to live by stealing;—a life which for the future may be interrupted for a while by his re-committal to prison for some offence, but will most surely be resumed so soon as he again becomes free. At last he reaches fourteen years of age; then, indeed, but not till then, a check may be put to his career. He has learnt enough of crime, has been exposed sufficiently to all the debasing influences of low vice, has at length grown to be four feet six inches in height, has reached the required age, and has thus qualified himself as a candidate for the only institution which the Government possesses for the reformation of juvenile offenders. Now, indeed, if convicted and sentenced to transportation, he may be one of the two hundred and fifty lads who are annually sent to Parkhurst,—an establishment of which all that is necessary to be said here is, that, considering who its inmates are, the high walls by which they are surrounded, and the somewhat military discipline which prevails within those walls, much surprise cannot be felt that, in the words of the last official report upon it, “a feverish restlessness leading to frequent attempts to escape” has been apparent amongst them.

But although no national means have been adopted to stay the progress of juvenile crime, something in that direction has been accomplished by means of individual and voluntary efforts. Some few who have seen with what a steady course the stream of corruption and of vice flows on, and how our whole system of punishment with respect to the young, instead of throwing obstacles in that course, only makes the stream flow faster and more foully, have, with courage, de-

votedness, and wisdom, gone to its source. And, of course, they have been successful. The efforts of Sheriff Watson and his coadjutors, in Aberdeen, are well known. In that town, in the year 1841, previous to the establishment of the first industrial school, there were as many as 280 juvenile vagrants. These have now all but disappeared. The great effective cause of this result lies in this, that there are now altogether 400 children at the several industrial schools which have been established since that year, and who would otherwise have been prowling in the streets of the town, or in the rural villages and country roads. The result of these schools with respect to the diminution in the number of juvenile crimes is equally satisfactory. The commitments have fallen from 61, during the year 1841, to 22 during the year 1850.

The example set by Aberdeen has been widely followed, although in no instance so completely. Ragged schools and industrial classes have been established in many parts of London, and in most of our large towns, often producing great good, and always civilising in some degree the poor little outcasts who have been brought for the first time within the sphere of a humanising influence. In some few instances, — such as the Westminster Refuge, and the industrial class of the Brook Street School, — the hand has been stretched out to those who had on several occasions been inmates of our prisons, and marked beneficial results have rewarded the labours of the wise, self-denying, and truly Christian men who have applied themselves to the task of reforming and instructing their wretched pupils. The Philanthropic Society has been long established, but it was not until lately that the Society removed their training establishment from London to the country, and entered upon the occupation of their Farm School at Reigate. Here, again, most successful results have followed the industrial and reformatory training to which the boys have been subjected. Twenty-two boys, sentenced to long terms of imprisonment in the Middlesex Houses of Correction at Clerkenwell and Tothill Fields, received pardons lately on condition of entering this Farm School. The result of the training they

received is thus given by the Reverend Sydney Turner¹ :—
“ Of the 22 boys, we have now 15 in the school, most of them lads of 16 or 17, and almost all of them looking forward to emigration,—a reward which their steady conduct, and efforts to improve themselves, have well deserved. They have all now served the full term of their original sentences, and remain here, obeying our discipline, and working in the different departments of our farm labour, in earnest, as volunteers. I have lately allowed such of the older of them as had decent relatives to go up to London and pass two days with their friends. They have come back to their time, having conducted themselves most satisfactorily, and with their purposes of thoroughly separating themselves from all their former habits and associates by leaving England, and seeking an honest livelihood abroad, confirmed.

“ The breaking these lads of their London tastes and dispositions, and bringing them to work on the land, and govern themselves by the rules of our free and self-controlling system, was no easy task, but after a few months’ wrestling and trial, they generally yielded to the influence that was brought to bear upon them, and began to interest themselves in their own improvement; and there is a steady earnest promise of right conduct in the older of them, that more than repays the worry and anxiety that their previous wilfulness and folly caused.

“ Seven of the original number, twenty-two, have left us. One is on his voyage to Hobart Town, where he has relations likely to be of use to him; four requested their discharge, or were applied for by their friends after their sentences were expired by some months; two deserted, (one for the second time, and after suffering three months’ imprisonment for the first offence), and have not yet been recovered, their friends and relations assisting to conceal them. Of the four who left with our consent, one has been again in prison, his mother being a professed receiver of stolen goods, and fully chargeable with the ruin of her son, and of many other boys whom she has seduced and led on to steal.”

¹ See 15th Report of Inspector of Prisons, p. 8.

The Asylum of Stretton-on-Dunsmore, in Warwickshire, has also been established for upwards of thirty years. Of the young criminals which that institution has received, the cases of decided reformation have been steadily increasing from between 40 and 50 to between 60 and 70 per cent. ; but the directors complain " that the subscriptions are year by year rapidly declining, and the increasing actual deficiency in the receipts of each year compel to that inroad on the funded property which must shortly lead to the dissolution of the establishment unless it can be placed on a different footing." What is happening at Stretton is feared also at Red Hill; the voluntary subscriptions, by which the Philanthropic Society is supported, are not sufficient to sustain that establishment, except within very narrow limits of action.

Too much praise cannot be awarded to those who have thus acted as pioneers to the cause; they have shown too how the child-criminal may be trained to good and industrious, and thus be led to throw off bad and idle habits; they have roused public attention to the thousands of poor children wandering about our streets, in a Christian country, yet without any knowledge of Jesus Christ, or of those precepts which He taught and died for; they have pointed to these outcasts as the source of juvenile crime; and have insisted that we should stay that crime at its source, instead of waiting, as we do now, until the once innocent and tractable child has become developed into the hardened criminal.

A more convenient season than the present could not have occurred for calling together those who had thus, in their several localities, been endeavouring to do something towards checking the onward current of juvenile crime; and it was with very great pleasure, therefore, that we heard that a Conference was about to be held at Birmingham, in order that by the continued efforts of those interested in the condition of the "perishing and dangerous" classes of children, the Legislature might be led to act effectually in this matter. The following is a copy of "the object of the Conference" as given in the requisition.

"A CONSIDERATION OF THE CONDITION AND TREATMENT OF THE
'PERISHING AND DANGEROUS CLASSES' OF CHILDREN AND
VOL. XV. A A

JUVENILE OFFENDERS, WITH A VIEW OF PROCURING SUCH LEGISLATIVE ENACTMENTS AS MAY PRODUCE A BENEFICIAL CHANGE IN THEIR ACTUAL CONDITION AND THEIR PROSPECTS.

"The children whose condition requires the notice of the Conference are :—

"1st. *Those who have not yet subjected themselves to the grasp of the law*, but who, by reason of the vice, neglect, or extreme poverty of their parents, are inadmissible to the existing School Establishments, and consequently must grow up without any education ; almost inevitably forming part of the 'perishing and dangerous classes,' and ultimately becoming criminal.

"2nd. *Those who are already subjecting themselves to police interference*, by vagrancy, mendicancy, or petty infringement of the law.

"3rd. *Those who have been convicted of felony*, or such misdemeanour as involves dishonesty.

"The provisions to be made for these three classes are :—

"For the first, *Free Day Schools*.

"For the second, *Industrial Feeding Schools*, with compulsory attendance.

"For the third, *Penal Reformatory Schools*.

"To bring such schools into operation there is needed :—

"For the Free Day Schools, *such an extension of the present Government Grants, from the Committee of Council on Education, as may secure their maintenance in an effective condition*, they being, by their nature, at present excluded from aid, yet requiring it in a far higher degree than those on whom it is conferred.

"For the Industrial Feeding Schools, *legislative enactments giving authority to Magistrates to enforce attendance at such schools on children of the second class, and to require payment to the supporters of the school for each child from the parish in which the child resides, with a power to the parish officer to obtain the outlay from the parent, except in cases of inability*.

"For the Penal Reformatory Schools, *legislative enactments giving authority to Magistrates and Judges to commit juvenile offenders to such schools instead of to prison, with power of detention to the Governor during the appointed period, the charge of maintenance being enforced as above*."

Upon the evening previous to the Conference there was a meeting of the requisitionists, at which Lord Lyttleton presided, when, after much discussion, the following resolutions

were unanimously agreed upon to be submitted to the Conference:—

“ 1st. That the present condition and treatment of the ‘perishing and dangerous classes’ of children and juvenile offenders deserve the consideration of every member of a Christian community.

“ 2nd. That the means at present available for the reformation of those children have been totally inadequate to check the spread of juvenile delinquency; *partly* owing to the want of proper Industrial, Correctional, and Reformatory Schools; and *partly* to the want of authority in Magistrates to compel attendance at such schools.

“ 3rd. That the adoption of a somewhat altered and extended course of proceeding, on the part of the Committee of Privy Council, is earnestly to be desired for those children who have not yet made themselves amenable to the law, but who, by reason of the vice, neglect, or extreme poverty of their parents, are not admitted into the existing day schools.

“ 4th. That for those children who are not attending any school, and have subjected themselves to police interference, by vagrancy, mendicancy, or petty infringements of the law, legislative enactments are urgently required, in order to aid or establish Industrial Feeding Schools, at which the attendance of such children shall be enforced by Magistrates, and payment made for their maintenance, in the first instance, from some public fund, power being given to the public authorities to recover the outlay from the parents of the children.

“ 5th. That legislative enactments are also required in order to establish Correctional and Reformatory Schools for those children who have been convicted of felony, or such misdemeanours as involve dishonesty; and to confer on Magistrates power to commit juvenile offenders to such schools instead of to prison.”

The Conference was opened on the 10th of December, Mr. Hill, Q.C., the Recorder of Birmingham, in the Chair. There were also present:—

“ Mr. Monckton Milnes, M.P.; Mr. Adderley, M.P.; Mr. D. Power, Recorder of Ipswich; Mr. W. W. Whitmore, Dudmaston Hall, Bridgnorth; Mr. J. Fletcher, Inspector of Schools; Rev. F. Bishop, Minister of the Liverpool Domestic Mission; Mr. C. H. Bracebridge; Rev. T. Carter, Chaplain of the Liverpool Gaol;

Mr. E. Chapman, Honorary Secretary of the Bristol Ragged School; Rev. J. Clay, Chaplain of the Preston Gaol; Rev. J. Field, Chaplain of the Berkshire Goal, Reading; Mr. W. Locke, Ragged School Union, London; Rev. R. L. Carpenter; Mr. J. W. Nutt, Honorary Secretary of the York Industrial Ragged School; Rev. W. C. Osborne, Chaplain of the Bath Goal; Rev. H. T. Powell, Chaplain of the Warwick County Asylum; Mr. J. C. Symons, Barrister; Mr. John Taylor, Manchester; Mr. Alexander Thomson, Aberdeen; Rev. Sydney Turner, Chaplain of the Philanthropic Farm School; Mr. J. Macgregor, Ragged School Union, London; Rev. J. Reader; Mr. Charles Jenner, Edinburgh; Mr. Thomas Reynolds, Bristol; Mr. H. Grant, Bristol; Mr. W. Rathbone, Liverpool; Mr. T. Osler, Clifton; Rev. W. Grier, Stourbridge; the Rev. S. Gedge; the Rev. G. S. Bull; Alderman Martineau; Mr. George Edmonds; Mr. Joseph Sturge; Mr. R. K. Douglas; Mr. W. Morgan; and Mr. J. Corder, Clerk to the Guardians of the Poor of the Parish of Birmingham. Mr. Joseph Hubback, Honorary Secretary of the Liverpool Industrial Schools, acted as secretary on the occasion. Several ladies were also present, among them being the Hon. Miss Murray, one of the Maids of Honour to the Queen, and Miss Mary Carpenter, author of the well known work on Reformatory Schools.

"After prayer had been offered by the Rev. J. Clay, the Chairman proceeded to state that he had letters of apology from various well-known friends of the cause. The first, which was from Lord Brougham, was to the following effect:—

" 'Cannes, November 13. 1851.

" 'MY DEAR HILL,—I am sure I need not assure you how anxious I feel for the Conference and its success; but of course I cannot put my name to the requisition, as it would be an improper interference of one who must needs be absent. Among the names attached to the requisition, I observe some most valuable coadjutors in the inquiry of 1847, in the House of Lords. Of Mr. Clay, especially, it would be quite impossible to exaggerate the services and the merits.'

"Letters were also read from a peeress (whose name was not mentioned), from the Earl of Harrowby, Lord Lyttelton, Lord Lifford, the Bishop of Manchester, Mr. Slaney, M.P., the Hon. and Rev. G. M. Yorke, from several of the magistrates of Birmingham, from Serjeant Adams, from Mr. Caird, of Wigtonshire; Mr. Adshhead, of Manchester; the Dean of Salisbury; from Mr. Haywood, M.P.; Captain Clifford, M.P.; Mr. Scholefield, M.P.; Mr. Charles

Pearson, Mr. W. Gladstone, M. J. F. Ledsam, Rev. J. A. James, Mr. W. Chance, the Rev. Mr. O'Leary, of Manchester; the Rev. Dr. M'Crie, Rev. Dr. Guthrie, Rev. Dr. Candlish, Mr. J. Wigham, of Edinburgh, — all expressing an interest in the objects of the Conference."

The learned Chairman, in his opening address, gave a most luminous exposition of the object of the present conference. The children whose condition they were called upon to consider were divided into two great classes; those who had not come under the animadversion of the law, or the unconvicted class; and those who had come under its grasp, and had received the sentence of a court of justice. He explained that for the first, free day schools were required, but that no legislative enactment was needed in their behalf; it was only necessary that the Committee of the Privy Council should change the regulations by which at present that class of schools was precluded from obtaining assistance. With respect to the latter class of children, an Act of Parliament was required to enable courts of justice to commit the young offender to a correctional and reformatory school, instead of to a prison. He pointed, in illustration of the good effects which would follow such a change in our system, to what had been done in the Warwick County Asylum at Stretton-on-Dunsmore, where the per-centage of reformatory cure had reached to sixty-five per cent., and to the institution at Mettray, in France, where the per-centage of reforms was eighty-five. And as to the question of cost, he showed conclusively that society had paid most dearly for its neglect of juvenile criminals. The whole expense of keeping a child until he became reformed was at Stretton about 32*l.*; at Mettray about 42*l.*; the higher cost at Mettray arising from there being a greater staff of officers, which, on the other hand, augmented their number of reforms. He then contrasted the cost thus paid for the reformation of a child with the cost of his treatment under the present system of short imprisonments, and referred to the petition of the Liverpool magistrates to Parliament, and which was drawn by the late Mr. Rushton. That petition set forth the career of fourteen young offenders fairly chosen; of these some had been appre-

hended more than twenty times; all became confirmed criminals except one, who had left the neighbourhood, and whose history was unknown. Ten of the fourteen were transported. Putting together the various expenses attendant upon the apprehensions, imprisonments, and prosecutions of these wretched beings, they made an average of 63*l.* 8*s.* each, while in the case of the ten transported, another sum of 82*l.* must be added. He hoped that this calculation, which though long before the public, had never been impugned, would show even those who made the virtue and happiness of their fellow-creatures a pure question of pounds, shillings, and pence, at what a much lower figure coercion would stand in the "price current" than persuasion. Mr. Hill was followed by Mr. Hubback, Mr. Power, the Rev. T. Osborn, Mr. Monckton Milnes, the Rev. Sydney Turner, Mr. Sclinger Symons, the Rev. E. Chapman, Mr. Whitmore, and the Rev. J. Clay, who gave several interesting particulars of the results of their personal experience. The resolutions were put to the Conference and unanimously agreed to. A public meeting was held in the evening, upon which occasion the resolutions were again put, and passed unanimously. In concluding his speech at the evening meeting, Mr. Hill announced that a lady, whose name he was not at liberty to mention,—and he was grieved that he was debarred from conferring upon their proceedings the high sanction that name would lend to them,—had authorised him to offer "a prize of 200*l.* for the best essay, the object of which shall be to prove that there is a two-fold duty which society owes to children, to parents, to the State, and to itself; first, to save the young, as far as it is possible, from the contamination of sin; secondly, from the depraving consequences of sin after its commission; and to show that the fulfilment of this duty is of such vital importance to the progress of civilisation and Christianity, and that its neglect would breed evils and dangers so formidable, that it ill becomes a nation which has given millions to emancipate another race, and spent millions in purposes of little or no value to human welfare, to consider this duty wholly or even principally on an economical ground: to show also that

public opinion requires to be elevated and enlightened on this subject, in order that proper means may be provided for removing the barbarism and degradation of our countrymen, caused by leaving children to beg or steal, exposed to every species of evil temptation, and even to be trained in the schools of crime to become the accomplices of the adult criminal: also to point out the means whereby the objects above specified may be most economically and efficiently attained."

This kind and seasonable offer leads us to notice one of the most interesting facts connected with this Conference. There was none of that talk there which is usually heard when ladies form a portion of the audience, as if it were incumbent upon men to address them as beings of an inferior capacity to themselves. At the present meeting it was known to all that amongst the ladies who attended were some who had given long and anxious attention to the subject, who understood it philosophically as well as practically, and who had come to the Conference not to be flattered or amused, but to aid earnestly in the great work in which all present had engaged. Would that this feeling were more general, and that the world would not so obstinately deprive itself as it does of half of the intellectual power which has been sent into it by God.

Since the Conference took place we perceive that a deputation has waited upon the Home Secretary. We understand that Sir George Grey received them favourably, and stated that, although the Government had no measure in contemplation with respect to the treatment of juvenile offenders, he would give his attention to any details which might be furnished to him carrying out the objects of the Conference; and we believe that a Committee is now sitting in London for that purpose, and also for the purpose of preparing a memorial to the Committee of the Privy Council, praying for a grant in aid of free industrial schools.

We trust that in preparing these details the Committee will take care to insist upon the principle of *parental* responsibility. It was put prominently forward in the circular convening the Conference, as well as in the addresses of

many of the speakers. The 'correctional and reformatory school need not, and must not, be allowed to operate as a premium upon crime. The parents should in all cases where it is possible be made to answer for the crime committed by their child, and if others take the parents' place and support and train their child, it must only be upon the terms that the parents be made to contribute, so far as they can, to that child's maintenance.

Local responsibility should also be insisted on. Wherever a number of persons are gathered together, so as to form a community, whether in a village or a town, it is their Christian duty to take care that none of their younger members are growing up untrained, and therefore under circumstances favourable to their becoming criminal; and if such be their duty, the consequences of its breach should fall upon those who commit it, and upon no others. An infant puts his finger into the flame and suffers pain: he is taught thereby to avoid doing so for the future. If another suffered the pain, what profit, from experience, would the little creature gain? A child tells a falsehood: on that account he is not believed by his parents upon some occasion when, above all things, he wishes his word to be credited. By thus suffering the consequences of his falsehood he will probably try to avoid that vice for the future. The inhabitants of a town are reduced by fever, and are thus taught to adopt sanitary measures, so as to avoid a recurrence of the pestilence which has been so destructive to them. What if one district had to bear the effects of the bad drainage of another? Crime is a moral pestilence; its causes we are beginning to understand; and if each district had to bear the burden of the crime committed within it, the inhabitants of that district would be induced to take steps to prevent its commission. Our ancestors were wiser in their legislation in this respect than we have been. By the old law of frank-pledge, the existence of which has been traced nearly to King Alfred's time, the freeholders of a tithing were sureties, or free pledges, to the king for the good behaviour of each other, and if any offence were committed in their district they were bound to have the offender forthcoming; and therefore anciently no man

was suffered to abide in England forty days unless he were enrolled in some tithing or deanery. (Black. Com. vol. i. p. 114.) The law which still prevails, by which a remedy is given against the hundred to the owner of property riotously destroyed by a mob, is a familiar instance of the same principle.

Lastly, we would caution the Committee to avoid any provision handing over the proposed schools to Government management. Whatever pecuniary aid may be found necessary in order to strengthen voluntary effort, Government inspection, not management, should be the terms upon which that aid should be furnished. The work of reformation must be entrusted to those who not only feel its deep importance, but who, from thought and experience, are qualified to carry it on. What use is it to establish and furnish a hospital unless its medical officers are qualified to treat and cure disease? A reformatory school is a moral hospital; its inmates are there to be cured; the physician who is needed is a physician of the soul, and he must be, at the least, as skilful as one who restores the body to healthy action.

It is not the least of the good results that have attended the efforts of the last few years that men and women have been trained as teachers in our industrial and ragged schools who are fitted for the task of reforming the young criminal, not by insisting upon military discipline and outward order, but by stooping down to their pupils, thereby gaining their love and confidence, and thus leading them to appreciate and govern themselves by the precepts of that religion the blessed influences of which they daily see in practice around them. "I never forget," said the master of an industrial school, who has reformed many of the young London thieves, "that our Saviour at one time stilled the storm, and at another washed his disciples' feet, and therefore whilst I teach these boys my trade and their duty, I am generally first up in the morning to prepare their breakfast for them." Success in the treatment of juvenile offenders will follow the efforts of such men.

[ART. X. — COMPULSORY ENFRANCHISEMENT OF COPYHOLDS.

1. *Report from the Select Committee on Enfranchisement of Copyholds' Bill, together with the Proceedings of the Committee on Minutes of Evidence.* Ordered to be printed 17th July, 1851.
2. *A Bill (No. 3.), as amended by the Select Committee, to extend the Provisions of the Acts for the Commutation of Manorial Rights and for the gradual Enfranchisement of Copyhold and Customary Tenure.* Ordered to be printed 17th July, 1851.

COPYHOLDS are doomed. If any one has a doubt about the justice of the sentence, they can consult our previous volumes on the subject. At present the only point which, as it appears to us, need be discussed is, in what manner the complete abolition of this tenure can be most speedily accomplished. The materials for arriving at a just conclusion as to this are to be found at the head of this Article; first in the evidence taken by a very able and careful Committee, and next in the Bill which was prepared at their request, and which was afterwards faithfully revised by the Committee, and more particularly by the following members: — Mr. Aglionby, Mr. Mullings (who had both brought in Bills on the subject), Mr. Henley, Lord Robert Grosvenor, Mr. Sotheron, and Mr. Freshfield.

The following witnesses were examined on behalf of the several interests concerned: —

Professor Richard Jones,	} <i>Copyhold Commissioners.</i>
Mr. Blamire,	

Mr. James Stewart, *Secretary and Counsel to the Commission.*

Mr. Aglionby, M.P., *Lord.*

Sir Wm. Foster,	} <i>Representing the Lords and Stewards.</i>
Mr. Birt,	
Mr. Muskett	
Mr. Cuddon,	

- Mr. Stutfield, }
 Mr. Peachey, } *Tenants.*
 Mr. Welman, }

Mr. Lindley, *Valuer.*

The Committee then deliberated, and the following suggestions were agreed to as the basis of a Bill : —

“ That copyhold and customary tenures are frequently a bar to the application of skill and capital, an impediment to the improvement of the land, injurious to the public, and inconvenient to the lord as well as the tenant.

“ That it is highly desirable for the interest of lord, tenant, and public, that the entire enfranchisement of these tenures should be effected as soon as practicable on equitable terms, due regard being had to the rights and just claims of all parties.

“ That such enfranchisement should be rendered compulsory on all, in the manner hereinafter defined.

“ That it should be effected by means of a Commission.

“ That to such Commission should be entrusted full discretionary powers : —

“ 1st. As to the principles upon which the consideration for the manorial rights of the lord, and compensation for the interests of the steward, shall be assessed and paid.

“ 2nd. The time and mode of payment.

“ 1. Gross sum of money.

“ 2. Rent-charge.

“ 3. Portion of land enfranchised.

“ 3rd. The costs and expenses attending the enfranchisement and investing compensation-money, in cases where lords have limited interests.

“ That in case of rent-charge, it be transferable by lord and redeemable by tenant.

“ That until entire enfranchisement shall have been completed, enfranchisement shall proceed : —

“ 1st. Voluntary under the present acts.

“ 2nd. Compulsorily on any event causing admittance of a tenant and payment of fine (mortgage excepted).

“ 3rd. Compulsorily on two thirds of the tenants of any manor in number and value, with the consent of the lord, calling for enfranchisement of the whole manor.

“ In connexion with this, Commissioners to have power to divide manors into districts.

" On the expiration of (3) years from the passing of this act, Commissioners shall proceed to effect an entire enfranchisement.

" Commissioners to have full powers to set out boundaries.

" Mines and minerals to be excepted.

" Also copyholds for lives not renewable.

" Power to Commissioners to suspend enfranchisement under special circumstances, giving their reasons in their annual Report.

" Powers under this act not to interfere with powers exercised under other acts."

The Bill marked as No. 3. was subsequently agreed to, and brought into the House of Commons on the 17th of July, 1851, but it was agreed that it should not be pressed in last Session. We have no doubt, however, that it will be re-introduced in the Session just about to commence, and that the names on its back will be Mr. Aglionby and Mr. Mullings, as representing both sides of the House.

We believe that, under this Bill, if passed into law, the Copyhold tenure will cease to exist as speedily as is practicable, having regard to the difficult and important questions to be settled, and the various and conflicting interests to be adjusted. The measure will also confer a great benefit on the country, not only by simplifying the Law and rendering it uniform, but by introducing some important alterations in the practice of conveyancing which may hereafter be adapted to freeholds.

The proposed Act is to be carried into operation by the Copyhold Commissioners, who have been engaged in effecting the voluntary enfranchisement of copyholds for some years past, and who appear, by the evidence, to have acquired the confidence of all parties, and to whom large powers are to be confided: —

" 1592. I am still strongly of opinion that the only mode to effect the object, whether it be commutation or enfranchisement, with justice, so as to give satisfaction to the country, would be to effect it through a responsible Commission. I do not think that any persons, excepting a Commission with large discretionary powers, could be entrusted to effect so great a change."—*Aglionby.*

" 1593. *Chairman.* From the consideration which you have

given to this subject, and from the evidence which has been given by the officers of the Board, which has hitherto given its attention to voluntary enfranchisement, are you of opinion that any insuperable obstacles to a just and equitable enfranchisement exist?—I think not. The only difficulty that did press upon my mind, was how I could give sufficient protection to the poorer class of tenants, doing justice at the same time to the lord, and rendering him that which he is entitled to when deprived of any rights. I felt doubts with regard to the mode of dealing with a tenant who might have a difficulty in paying the compensation, who did not wish to enfranchise, and who, having been already admitted, conceived that he had a term either till he died or till he alienated. But having had the benefit of hearing the evidence of the witnesses, I do not now see that that is an insuperable objection. I think it may be effected equitably for the lord, and with fairness and without injury to the tenant, under more than one mode, especially by that mode recommended by Sir William Foster, Mr. Muskett, and Mr. Cuddon. The witnesses have changed my opinion upon that subject, by showing me that there are ways in which the evil as contemplated, and the hardship to the tenants, may be obviated.—*Id.*

“ 1594. When you talk of giving large discretion to the Commissioners who might have to carry any bill into execution, you mean with reference to the difficulties which you have already referred to, and also on account of the variety of modes in which those difficulties must be met?—I do; I think that if the Legislature were to condescend upon particular modes of direction, and to fetter the Commission, it would render the whole nugatory, in many instances very oppressive upon tenants; and there may be instances which I can imagine where there should be large discretion given to the Commissioners, to protect the lord against any effects arising from the power of the tenant, under the enfranchisement, to use his land in a way which he cannot have now. I can imagine a case where a tenant has a tenement adjoining land upon which the lord, trusting to the impossibility of the tenant building upon it, has erected a house, and laid out his pleasure-grounds close to that tenement. If the tenant were enfranchised without a large power being entrusted to the Commissioners to impose certain terms for the protection of the lord, the lord might find himself in the situation of having laid out a great deal of money upon his property, and immediately after the enfranchisement the tenant might erect some intolerable nuisance upon his tenement, having got it enfranchised. And therefore I think in that case,

for the protection of the lord, you should give large powers to the Commissioners. There may be hundreds of such instances."—*Ib.*

The stewards say the same thing : —

" 1249. Is it your opinion that compulsory enfranchisement of this description should be effected through the medium of some responsible public commission?—I do not think it possible to carry out any such measure without some public body; there must be always many points which it would be necessary to refer to them; they are a sort of general public umpire, doing even justice to both; not favouring the lord nor favouring the tenant."—*Cuddon.*

" 1342. *Chairman.* In carrying out a great public measure of this kind, which you think is for the benefit of the public, as well as of the lord and the tenant, you would employ a Commission, with large discretionary powers, being a responsible body, to carry it into effect in the best way possible?—Yes; it would be expected by the public that they would be impartial judges, and not favour either the lords or the tenants. Supposing, as a matter of course, that they did impartial justice between the two, I do not think that there could be any objection to giving them very ample powers."—*Cuddon.*

It is obvious that to carry a measure of this nature into effect properly and justly, large powers must be entrusted to the body which is to perform this service; and these have not been withheld, as we shall see.

I. On any admittance to copyhold lands taking place after the Act comes into operation, the tenant is to pay the fine and fee then due; but the lands shall forthwith be enfranchised (s. 1.) on payment of the proper compensation; if the parties agree, then the enfranchisement shall be made on the basis agreed upon, if not, on a valuation under the direction of the Commissioners (ss. 2—7.). The valuers are to determine the compensation of the land in a gross sum of money, and shall frame a schedule of valuation, showing the amount of such compensation, which amount shall either be paid in money forthwith after the completion of the enfranchisement; or, if the Commissioners shall so direct, the same shall remain a fixed charge for any time not exceeding ten years, and paying interest at 4*l.* per cent. from the time of completion

(s. 8.); after hearing all objections, the Commissioners shall confirm the schedule or award (s. 11.). The enfranchisement may be made in the form in the schedule, to which, if adopted, peculiar advantages are to attach (s. 14.). So any charge under the Act may be made by a certificate under the hands and seals of the Commissioners, a form of which is also given in this schedule, which certificates are to be transferable by endorsement. These provisions will not only greatly facilitate the proposed measure for the enfranchisement of copyholds, but may supply a valuable hint for a subsequent dealing with freehold land.

This is the first class of proceedings under the Act, and we need not point out to our readers how extensive it will be. From the day the Act comes into operation, compulsory enfranchisement comes into operation in this safe and gradual manner. But there is another important clause which must be taken into consideration with reference to this part of the measure. This is s. 24., under which, the lord is to make a declaration stating the nature and extent of his estate and interest in the manor, and the date and short particulars of the deed, with another instrument under which he claims or derives titles, and the incumbrances, if any, which affect such manor; which title is to be approved by the Commissioners unless they shall think that further information is necessary; but if the Commissioners shall consider either that the title of the lord is unsatisfactory, or that the incumbrances should be protected, then if they think the justice of the case requires it, they may direct the enfranchisement consideration shall be invested, as in case of land under disability.

Under this clause there will be no expensive or stringent inquiry into the title of the land, still it will enable the Commissioners to protect all parties.

II. The second class of proceedings to effect enfranchisement points to manorial enfranchisement; and under clause 40, meetings may be called of lords and tenants of manors on twenty-one days' notice, for the purpose of agreeing on terms of enfranchisement, and at such meetings, the lord and two-

thirds of the tenants in number and in value may agree on terms for a general enfranchisement.

Power is also given to effect enfranchisements or commutations, as well at money as corn rentcharges (s. 42.).

These are all large additional means for effecting the expiration of the tenure; but the most important of all is now to be stated; and these clauses are so important, that we shall state them more fully.

III. After the 1st day of January 1855, the Commissioners shall proceed at such time, and in such order, as to them shall seem fit, either by themselves or by some assistant Commissioner, to ascertain the total sums to be paid for the enfranchisement of all the lands in the manors in which no agreement, binding on the lord and tenants, shall have been made and confirmed. The Commissioners are then to require all necessary information from the steward, and thus complete the steward's schedule of apportionment (s. 46.). Notices of inspection are to be given, and a meeting is to be called, to hear objections and to appoint valuers; and, after the schedules are inspected and meetings held to hear objections, the Commissioners are to make an award of enfranchisement, and such award shall be conclusive as to all matters within the jurisdiction of the Commissioners, which shall be recorded or awarded therein.

Thus, if this Bill shall pass into law, which seems highly probable, if not certain, we may all hope to see this absurd and inconvenient tenure disappear from the face of the land in a few years.

We will conclude this paper, which we might have made much longer, and more elaborate, if we had thought it necessary, by saying a word—we trust it may be a word in season—to all persons interested in this matter. We believe there is now an opportunity of effecting a settlement of this question, with great benefit to all. If each party is disposed to approach the question in a fair spirit of compromise, and with an earnest wish to meet the opposite interests frankly and honourably, a great boon may be conferred on the Public, with large gain to many and but slight inconvenience to any one. It is now practicable to adjust all fair

and reasonable claims satisfactorily and in a good spirit. This may not always be possible. If the present good opportunity be lost, if extravagant demands are made by lord, by tenant, or by steward — a spirit will be roused that will not be so easily dealt with; and the measure will be accomplished (for of that we have no doubt), but roughly and probably unjustly. We say this with a full knowledge of the whole case, and with a sincere wish to deal considerately and patiently with all.

ART. XI.—LAW AMENDMENT AND THE JUDGES OF THE SUPERIOR COURTS.

WHEN the race of Plantagenet sat upon the throne of England, the union of the Sovereign with his great Barons was sufficient to overbear all resistance; and the open empire of force left comparatively little necessity for the exercise of fraud. The King governed his realm and punished his enemies neither by servile Parliaments, nor corrupt Judges, but by the power of the stronger.

The Sovereigns of the House of Tudor found a complying Parliament their most ready instrument; and a King who could procure the passing of any statute, which he chose to dictate, had no occasion to resort to a tampering with the administration of justice. But under the House of Stuart, though the claims of the Crown were theoretically more extensive than under the Tudors or Plantagenets, the House of Commons had emancipated itself from Court influence. Led by the ablest lawyers in the country, it could not be cajoled or overreached like the unlettered councils of former days, nor could it be terrified and overawed like the miserable puppets of Henry the Eighth. Hence the power to compel obedience by naked force, or to direct the course of legislation, being withdrawn from the Crown, nothing was left but to corrupt and pack those to whom was entrusted the interpre

tation and administration of the laws; and we find the system of tampering with the administration of justice, and removing honest to make way for unscrupulous Judges, prevailing more and more till the reign of James the Second, at which period, like other abuses, it reached its utmost development. The prerogative of the Sovereign is part of the Law, the Law was declared by the Judges, and the Judges were removable at his will. What wonder then that promotion to the Bench should be confined to those whose views of prerogative were acceptable to the King, and that the slightest faltering in this course should have been punished by immediate degradation? It is really wonderful that so many sound constitutional doctrines should have been laid down by persons holding office at the pleasure of the Crown, and that the spirit of freedom should have survived for six hundred years the existence of so powerful an instrument of tyranny. The first effect of the Revolution was to deprive the Crown of all power of removing Judges, and to vest this important prerogative in the two Houses of Parliament. This enactment was levelled at the gross tampering with the Bench of Justice which had disgraced the two former reigns, in which Jeffreys was made Judge in order to condemn Algernon Sidney, Saunders to disfranchise the City of London, and Herbert to establish the dispensing power. The independent position conferred on the Judges has saved them from being made the tools of the Crown; and, with some few exceptions, from the contrary temptation of making the discharge of the duties of the Bench a means of obtaining popular applause. It has also secured a pure and impartial administration of justice; and by placing the Judge beyond the reach of political temptations, has increased the confidence of the Public in his integrity.

It seems very ungracious to attribute any evil effects to an institution which has been attended with such admirable results. But we are bound to express the opinion that the absolute liberty and impunity from all supervision or correction enjoyed by our Judges, together with much good, has in it also no inconsiderable alloy of evil. In our anxiety to shield the Judges from corrupt influences, we have in some

degree raised them above that from which no body of men whatever, in a free country, should be exempt — the influence of public opinion. It is to be feared that some of these dignified magistrates occasionally indulge in sallies which, though sure to provoke the laughter of a crowded court, do not tend to create respect for the judicial character, and in a freedom of observation and censure such as a class of persons whose tenure of office was less secure would not venture to employ. This, however, is but a trifle compared with the graver offence into which the Judges as a body have fallen ever since the reformation of the law has been attempted — the offence of employing their high and irresponsible position as a means of ridiculing, thwarting, and counteracting the best meant and best executed attempts at improvement. The utter abandonment of scientific legal education in this country has tended to narrow the study of the lawyer to our own municipal code. The result is, that we mistake antiquity for truth, and the maxims of a barbarous age for the perfection of reason. In no class of men has the conservative spirit been so strong as in English lawyers. Of that class, with its merits and its defects, the Judges are the appropriate type. Long after all impartial inquirers were convinced of the necessity of modifying our Penal Code, they clung to each and all of its provisions with desperate tenacity; and every attempt which has been made to improve the enormous deficiencies of our municipal law has been felt and looked upon by the judicial order as an attack upon their dignity and an inroad on the integrity of that system whose details they have spent so many years in mastering. This can create no wonder, and ought not to be severely censured. So much is demanded from a Judge, that it is said to require twenty of the best years of his life to acquire the requisite amount of learning. Our Judges have been, in general, able, impartial, learned, and independent; and we must not repine if they have also been wedded to antiquated prejudices, and utterly unable to appreciate the merits of any system besides our own. Every profession has its besetting weakness — naval and military men, trained under a system of absolute command, have often too little

respect for the complicated and balanced provisions of civil government; medicine is accused of daring and dangerous speculations; the clergy have leant to doctrines adverse to civil liberty; and it cannot be wondered at that the sages of the law should have an undue reverence for the least defensible principles of the science of which they are the professors. *Hanc veniam petimusque damusque vicissim.*

We do not, then, very seriously complain of the highly conservative opinions which have ever characterised the English Bench. It certainly would have been gratifying to those who are anxious to discover in the Judges not merely professional adepts, but persons possessing enlightened views of Jurisprudence, to have been able to record any important alteration of the law against which the whole weight of their authority has not been enlisted, and to have found them not invariably the last to admit the necessity of improvements long demanded by the spirit of the times before they were conceded. It would have been satisfactory to know that their influence had not been uniformly exerted to counteract the benevolent exertions of Sir Samuel Romilly, to mitigate our sanguinary Criminal Code; that they had been able to appreciate what Judge Jeffreys fully admitted, the hardship of denying a prisoner the benefit of Counsel, or that they had sanctioned with their approbation the greatest legal reform of our times—the institution of County Courts. But these things are not to be; and we have no right to complain of conscientious though manifestly erroneous opinions. What, however, we do complain of is, that in these latter days in which reforms have become more frequent and more sweeping, the Judges, as a body, not only entertain opinions directly at variance with the wishes of the nation, but place themselves in a position of marked antagonism to the onward progress of Legal Amendment. The mind of the nation is earnestly set upon obtaining cheap justice; yet no jest is so palatable in Westminster Hall as one levelled at this fair and reasonable desire. It is impossible to mistake the spirit in which every act designed for the amendment of the law is received—the sneers, the sarcasms, the violent prejudice, the undissembled hostility with which it is encountered, the

narrow cavilling and unfair animus in which it is criticised. So far from seeking to carry out the intention of the Legislature, the Courts look upon statutes intended to reform the law as dangerous invasions of their peculiar province, and as mandates which are only to be obeyed when they cannot, by possibility, be eluded. Where the words are too plain to admit a doubt, the policy of the measure is carped at, and the Legislature is too often held up to contempt in the very Courts entrusted with the administration of its laws. If any construction, however forced, can be suggested, which would either tend to defeat the policy of the law, or to extract from it a conclusion notoriously contrary to the intention of its framers, such a construction is caught at with avidity, and sustained with perverse ingenuity. If nothing of this kind can be effected, it is sought to render the law unpopular, by annexing to it incidents not indeed necessarily connected with it, but such as are likely to create aversion in the public mind. We do not scruple to say, speaking generally, no two things can be more utterly different than the spirit in which laws for the reformation of legal abuses are framed, and that in which they are interpreted and administered. Unfortunately, the history of a single Act of Parliament, and that one which has only been in force three months, will furnish us with ample proof and illustration of every thing which we have asserted.

It is well known that the recent Act for admitting the evidence of parties was, in common with every other legal improvement of late years, very displeasing to a very large majority of the Judges of Westminster Hall. Fortunately, however, a long experience had taught Parliament that to bow to this censure would be to deprive the country of almost all useful legislation on such subjects, and notwithstanding the disapproval of the Judges, this excellent bill passed into a law. The Judges announced their intention of giving it a fair trial, which is probably the least which could be expected from persons bound to administer the law as they find it. It is very curious and instructive to mark in what this fair trial consisted. The first attempt, was to force upon the Act, we cannot say a construction, but rather an

additional clause, virtually repealing all the rest, to the effect, that persons, however respectable and honest, giving evidence in their own cases, were to be treated by juries as approvers, and utterly disbelieved, unless their evidence were corroborated in some material point. Now as no one will call a party to prove that which can be established by an indifferent witness, the principle value of the evidence of parties consists in the proof by them of matters in which corroboration is, for the most part, impossible. Had this gloss, therefore, succeeded, the result would have been to render the law almost a dead letter; but the suggestion produced a feeling which could not be mistaken, and having no colour of law or justice to support it, fell to the ground.

We may also remark in this place the extreme difficulty found in inducing the Judges to give effect to the clear and explicit words of the section, permitting the inspection of documents.

The language of the Act being too clear and unambiguous to admit of repeal by way of construction, the next device resorted to was, to get up a reign of terror which might deter parties from having recourse to its provisions. Judges who had been in the habit of observing for years those flat and gross contradictions so constantly found between the testimony of witnesses apparently indifferent, without giving effect to the statutory provisions which enabled them to direct an indictment for perjury, were suddenly seized with horror and indignation when they found the same discrepancies existing between the statements of plaintiff and defendant. Luckily, a new Act had passed, which facilitated the direction of an indictment in such cases, but left that direction to the discretion of the Judge, not to be exercised unless he should be convinced of the guilt of the witness. Under these circumstances, in every case of contradiction between plaintiff and defendant, the Judges hit upon the expedient of bewailing to the jury the distressing predicament in which they were placed by being obliged to disbelieve one of the parties, and of delegating to them the discretion entrusted by the statute to the Judge. Under this system both parties were detained in Court till the verdict

was delivered, to show how completely the Judge abandoned the discretion he ought to have exercised, and the loser was immediately committed to take his trial for perjury. In one instance the losing party, who had been thus committed, moved for a new trial; and in the course of the argument the Judge who tried the case stated that he did not know for which side the verdict ought to have gone, and that very likely both parties were innocent, having been deceived by one of the witnesses.

Now we ask how is it possible for any law, however carefully framed and wisely devised, to overcome such interpretation and administration as this. Nor is this an isolated instance. It would be easy, but it is unnecessary, to adduce a number of similar cases with reference to other recent Acts of Parliament. In ancient times the Judges were more liberal than the Legislature, and we find them repealing the statute *De donis* and astute to extend by construction the narrowness of Acts of Parliament. Now the situation is reversed; the Judges and the Legislature are still at war, but the struggle is not to extend but to curtail the liberal provisions of our statutes. We would earnestly entreat these learned personages to consider in what such antagonism must end. They have already the mortification of seeing that their adherence to undoubted abuses has deprived their opinion of much of the weight which its expression would once have carried. Nor can they afford to be such rigid critics of the legislative efforts of others. Lord Tenterden's extension of the Statute of Frauds contains one section which is absolute nonsense, and the only great alteration in our Law during the last twenty years which has utterly and entirely failed of its object, is the code of new rules prepared by the Judges themselves.

It is quite impossible that the Reform of the Law can be carried out unless it receives its fair share of support from the Courts of Westminster Hall. Reform the Public is determined to have, and it will not be turned aside from its purpose by the opposition of even the most elevated and the least responsible of its servants. The judicial order enjoys an immunity from popular and political influences possessed

by no other class of persons in this country. The best advice which can be tendered them is not to push the advantages of their position too far. They cannot arrest the course of Legal Reform, but they can and will, unless they act with more caution, raise the question how far it is worth while to place it in the power of any body of men to counteract with impunity the will of the Parliament and the people. It is not enough that the administration of justice should be uninfluenced by fear or favour: we have a right to require that the Law should be expounded and applied in the spirit in which it is made. The day has gone by when popular liberty was identified with the privileges of Parliament, and the Courts gained an easy victory over the House of Commons. But they are now unadvisedly entering on a struggle of a different and more arduous nature. Let them once succeed in convincing the Public that measures of substantial improvement are not safe in their hands, and a remedy will speedily be found. Possibly the constitutional power of the two Houses may be called in to correct individual aberrations, or the whole question of the tenure and responsibility of judicial office may undergo a complete revision, whose end it is not easy to foresee. We sincerely trust the day is far distant when an English House of Commons may be called upon to consider the questions so often discussed in America, and that the discretion of our Judges may render any alteration in the mode of their appointment, or in the tenure of their office, as needless as it would undoubtedly be ungracious and unconstitutional.

ART. XII. — NUMBER XXIX.

WE are rather proud of our last Number (No. XXIX.). The case required strong medicine, which it was our disagreeable duty to administer; but the effect has been marvellous. We do not wish to say one word in a spirit of triumph or undue exultation; but with respect to some venerable and worthy

persons to whom we then alluded, and who have since given such remarkable signs of life, we must borrow inspiration elsewhere to describe correctly what has happened. We had indeed to deal some severe blows —

Stricto Medea recludit

Ense senis jugulum ; veteremque exire cruorem
Passa, replet succia. Quos postquàm combibit Æson,
Aut ore acceptos aut vulnere, barba comæque,
Canitie posita, nigrum rapuère colorem.
Pulsa fugit macies ; abeunt pallorque situsque ;
Adjectoque cavæ supplentur sanguine venæ ;
Membraque luxuriant. Æson miratur, et olim
Ante quater denos hunc se reminiscitur annos.

Met. vii. 285—293.

In the first place, the Benchers of the Inns of Court have shown decided symptoms of rejuvenescence. At the time that this is written, we have not in our possession the Plan of Legal Education proposed by these high authorities, but from the information that we have received, we have good reason to believe that this time it will be a considerable advance on any former proposition, and that it may even supply the demands which have now been made by the Public in a tone which is not to be mistaken : in short that a Law University is to be founded, and to be endowed by the revenues of the Inns of Court.

The necessary requirements have been indicated elsewhere in this Number, and we do not think that less than these will now be accepted. The scheme of the Benchers, when it comes before us, shall receive at our hands the most respectful attention. We shall hail the triumph of an intelligent minority in each Inn over an obtuse if not an interested majority ; but still we must receive sufficient security that the experiment will be fairly and honestly tried ; that a real examination shall be made before any Law degree is conferred ; that the examining power shall be entirely distinct from the power that confers the degree ; and that all that is proposed to be done is done with sufficient promptitude.

“ Great BENTHAM’s¹ shade complains that we are slow,
And WYSE’s² ghost walks unavenged amongst us.”

¹ A Benchers of Lincoln’s Inn.

² Chairman of Com. Leg. Ed. H. C.

The Benchers of Lincoln's Inn have recently been reminded of their duty by a learned lecturer¹, who, as he discoursed of former times and recalled their trust to their recollection, may have also brought to their remembrance the Picture that hangs in their Dining Hall, which tells the sacred story of one who reasoned of RIGHTEOUSNESS, TEMPERANCE AND JUDGMENT TO COME, and of a JUDGE who trembled; and if the worthy Benchers will search a familiar commentary on that picture and on Hogarth's own Travestie of it, they may chance to find their own situation not unfaithfully described. Of this we are satisfied, that the present mode of election to the Bench of the Inns of Court cannot much longer be endured; and that Æsop's amazement at finding forty years struck off his life in one moment could not have been greater than will be that of many an old comatose Queen's Counsel in finding that he is expected as Benchers to lead the van in superintending the education, and in presiding over the future destinies of the Bar of England.

As, however, we prefer retaining the sanction of old institutions wherever this is possible to setting up new ones, it will be our earnest wish to support the scheme promoted by the Inns of Court, if by its means the real end in view can be obtained.

The Benchers are not the only gentlemen of a certain age who have imbibed the magic draught, who have, in fact, taken our medicine to their advantage. Our friends, the Council of the Incorporated Law Society, have also shown signs of rejuvenescence not to be mistaken. They have recently given their days and nights to Law Reform, and have (11 Dec. 1851) sanctioned a Report on Equity Procedure highly

¹ A Lecture on the Early History and Academic Discipline of the Inns of Court and Chancery, delivered before the Benchers at Lincoln's Inn, on the 20th Nov. 1851, by John Fraser MacQueen, Esq., Barrister. The passage we refer to is as follows: "In ancient times, that is, down to the seventeenth century, the call to the Bar was not by the Governors or Benchers, but by the Reader of the Inn; who examined the candidates, and advanced or kept them back according to their deserts. The Judges in general paid regard to the certificate implied in the call, *because the call was not a matter of course, but involved investigation*. When the Judges surmised that the call was a mere formality, they refused to recognise it, and thus all mischief to the public was easily prevented." (p. 14.)

creditable to their Society. This can only be regarded as a great step in the march of Law Amendment. In this Report the JUDGE-MASTER principle is completely reasoned out and vindicated. We will not disguise our satisfaction at this Report; we frankly say, that there are no persons with whom we would more heartily co-operate in the cause of Law Amendment than with experienced and liberal-minded solicitors, and there are many in whom both qualities are united. Let them then go on as they have thus commenced; let them find their true interests and that of their own branch of the Profession, in furthering the interests of the Public, and obtaining for both, laws well defined, cheap and speedy justice founded on a good and uniform procedure, and a sound and satisfactory mode of dealing with the transfer of land. We do not now despair of their valuable aid in all these matters. In fact, we daily receive proof of the growth of this feeling among solicitors. If we wanted further evidence, we might refer to the Report of the Manchester Law Association, agreed to on the 9th Jan. 1852, which is entirely to our mind, and could not have more completely expressed our own sentiments had we written it ourselves. This Report calls, amongst other things, for "a well-digested plan of local registration, calculated to simplify titles to land, and to reduce the expense of conveyancing;" and objecting to the Registration Bill of last Session as it came down to the House of Commons, for reasons in many of which we fully concur, it admits that "a general feeling existed among the members of the Legislature in favour of some plan of registration; for facilitating the transfer of land, and of reducing the expenses of conveyancing;" and they thus conclude this able document:—

"Law associations will become more and more useful as the defects of existing systems will become patent to the intelligence of the age. The law is in a state of rapid transition, and lawyers *should assist if not direct the course of reformation*. Few of the solicitors, considering the talent and resources of the body, actually legislate in the House of Commons, but out of doors they do influence legislators. *Let their efforts be anxiously devoted to the great cause of legal, and so of social and of moral improvement, to the prudent reform of acknowledged evils, and to the prevention*

of hasty and ill-considered innovations. It is certain that no true lawyer will regard that as an evil, which, by elevating the tone of society at large, of necessity raises his own, and makes at once more necessary and more acceptable to the community amongst whom he dwells, the services of a learned and liberal profession."

We do not know when we have lately seen any document so much in accordance, as well with our own views repeatedly expressed, as with sound policy, as this Report. Coming from a body of the Profession so numerous and intelligent as the Manchester Law Association, it is highly important. We hope then to find, not only eminent solicitors individually, but the bodies representing this class of the Profession, in the van of the Law Reformers; that so far from opposing any attempts at amending our laws, they will put them down only by producing better and more useful measures. For years we have endeavoured to prove that this is their only safe policy; that any other course is most injurious to their best interests; that the true friends of the Profession are those who would thus elevate them in public estimation. These views we believe, will soon regulate all future proceedings, and those who withstand them will be displaced and left behind as laggards in the race.

In the language of the Manchester Report, no wise lawyer will regard as an evil the elevation of the tone of society at large and his own consequent elevation. Whether purely narrow-minded or sordidly narrow-minded, the day has arrived when another policy is required, and must be pursued to preserve the very existence of the Profession.

So far then we feel proud of No. XXIX. But we have yet another effect to state, which, to say nothing of the redress of minor points to which we may hereafter advert, has followed its publication. We there told the Bar that it had sufficient power in itself to assert its true position. This appeal has been met by the production of the Report, which follows this Article, and which shows, as it appears to us, that a new era for the Bar has commenced, which will be attended by most important results to the Public. This Report will require careful consideration: there must be no rashness, but a great truth is to be developed, and for its development we ask only "a fair field and no favour."

ART. XIII.—REPORT OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

THE BAR, THE ATTORNEY, AND THE CLIENT.

A SPECIAL COMMITTEE was appointed to consider the present relation between the Barrister, the Attorney, and the Client; and to report whether any, and what, alterations can be made therein, with advantage to the Public.

REPORT.¹

Your Committee, on entering upon the comprehensive subject referred to them, have sought to ascertain the precise nature of the relation which exists by force of any positive law, or of any rule of professional etiquette, or of any usage, between a client, the barrister, and the attorney, and have then proceeded to inquire;—whether clients should be permitted to consult or retain barristers, either as chamber counsel or as advocates, without the intervention of attorneys;—whether the statutory enactment which prohibits barristers from practising in the County Courts, “unless instructed by an attorney,” ought to be upheld;—whether attorneys should be allowed to act as advocates in the Superior Courts;—whether any alteration should be made in the existing regulations with respect to attorneys becoming barristers, and barristers becoming attorneys;—whether any alterations should be made in the law which regulates the legal liabilities of barristers and attorneys respectively in cases of gross negligence, and breach of confidence; and, lastly, — whether a Bar Institute or Faculty of Advocates should be established, invested with the power of superintending the admission of members to the Bar, and of investigating and punishing cases of professional misconduct.

The question of the remuneration of barristers and attorneys is reserved for a separate Report.

¹ This Report has been presented, and is ordered to be received on Feb. 23.

By the Common Law, members of the Bar are alone entitled to practise as advocates, pleaders, or counsel in our Secular Courts; and various ordinances, still in force, expressly prohibit any one who has not attained the degree of Barrister-at-Law from practising as an advocate in the Superior Courts, or before the Justices of Assize.¹

The members of the Bar being invested by the Common Law with these important rights, a corresponding and equally important liability attaches to them, which precludes them from refusing their aid to any one who formally demands their services. This liability has in former times been so clearly recognised, that several cases are mentioned in the books, in which the Judges have peremptorily compelled counsel to act for a suitor.² Indeed, in the instance of pauper suitors, and in several other matters, the Legislature has expressly empowered the Courts to assign counsel to conduct the cause.³

The duties devolving upon barristers at the present day consist in advising on questions of Law and Practice, in preparing legal instruments, in drawing pleadings, and in advocating the causes of suitors in Courts both Civil and Criminal; and these various duties are performed under the control of the Judges of the Superior Courts and of the Benchers of the several Inns.

The profession of an attorney, though indistinctly alluded to in several earlier Acts⁴, may be said to date its existence from the statute of Westminster 2. c. 10., which was passed in the year 1285. By that statute attorneys were permitted to prosecute and defend any action in the absence of the parties to the suit. The practice thus sanctioned of appearing by attorney soon became frequent, and we learn from the preamble of an act, passed in 1402⁵, that there were

¹ See Orders of the Privy Council and Judges for the regulation of the Inns of Court, 16 Eliz. 1574. Dugd. Orig. Jud. 312.

² See *Paston v. Genney*, year-book, 11 Edw. 4. fol. 2. pl. 4. cited in Appendix to Manning's *Serviens ad legem*, p. 230. Viner's Abridgment; *Pauper, D.*

³ 11 H. 7. c. 12.

⁴ See stat. of Merton, c. 10., passed in 1260; stat. of Westminster, i. c. 33., passed in 1275; stat. of Gloucester, c. 8., passed in 1278.

⁵ 4 Hen. 4. c. 18.

then "a great number of attorneys ignorant and not learned in the law, as they were wont to be before this time." To remedy this evil, the act ordains, "that all the attorneys shall be examined by the justices, and by their discretions their names put in the roll; and they that be good, and virtuous, and of good fame shall be received, and sworn well and truly to serve in their offices."

A rule of the Court of King's Bench, of 1615¹, describes the province of attorneys at that time to be "to put in records, and to appear for clients at the Assizes in such records in which they were named attorneys before the Justices at the Assizes, and to be prepared to inform the counsel of their clients and masters in that behalf."

In more recent times the practice of attorneys has been gradually extended to various other offices; such as those of scriveners, money brokers, stewards, receivers, and legal and confidential agents in family matters; while, a series of statutory enactments has conceded to them an extension of their exclusive privileges to proceedings in all Courts of Law and Equity², and a right to exercise several functions which, at Common Law, appertain peculiarly to the province of Counsel. Thus, they are expressly authorised³ to prepare deeds, conveyances, and other legal instruments; they have concurrent audience with the Bar in the Bankruptcy Courts⁴; and owing to the peculiar wording of a clause in a recent statute⁵, they occupy in the County Courts a still more favourable position.

Such being the relative functions of the two branches of the Legal Profession, your Committee have proceeded to investigate a practice, commonly resorted to at this day, of clients consulting and retaining barristers only through the intervention of attorneys. This practice, excepting in the County Courts, where a barrister is by statute prohibited from appearing for his client, "unless instructed by an attorney," is not founded on any positive rule of law, as was distinctly

¹ Reg. Gen. Easter T. 13 Jac. 1.

² See the 6 & 7 Vict. c. 73., commonly known as the Attorneys' Act.

³ See 44 Geo. 3. c. 98. sec. 14.

⁴ 12 and 13 Vict. c. 106. sec. 247.

⁵ 9 and 10 Vict. c. 95. sec. 91.

determined in the recent case of *Doe dem. Bennet v. Hale*¹, in which all the old authorities are reviewed. Indeed, it has never been doubted that in conveyancing or in criminal cases a barrister may by the Common Law be retained directly by the client; and as it has been laid down that he cannot withhold his services when a retainer is tendered, it seems to follow that before this doctrine can be narrowed by a condition that such tender shall be made only through an attorney, some long established rule of professional etiquette or immemorial usage to that effect must be shown to exist. Your Committee have been unable to discover any such rule or usage.

They find, however, that there is a prevalent impression amongst the Public and the Profession, that a client cannot with propriety retain or consult a barrister save through an attorney; and that this notion has given rise to a very general practice of resorting to the attorney in the first instance,—a practice which they have endeavoured to trace to its origin.

The historical records of the 17th century show that this practice had not then become usual.

In Lord Campbell's *Life of Sir Mathew Hale*², will be found the following passage:—“He did not take the profits that he might have had by his practice, for in common cases, when those who came to ask his counsel gave him a piece, he used to give back the half, and to make ten shillings his fee in ordinary matters that did not require much time or study.” Lord Campbell adds in a note, “At this time the client consulted the barrister in person, and paid him the honorarium without the intervention of attorney or clerk.”

In Roger North's *Life of Lord Keeper Guildford*, it is stated that soon after his being called to the Bar, “he began to feel himself in business, and as a fresh young man of good character, had the favour of divers persons that out of a good will went to him, and some near relations.” He was once asked if he took fees of such. “Yes,” said he, “they come to me to

¹ 15 Q. B. Rep. 171.

² See Lord Campbell's *Lives of the Chief Justices*, vol. i. pp. 585, 586.

do me a kindness, and what kindness have I if I refuse their money?"¹ In those days, indeed, counsel seem to have been almost universally resorted to for legal advice in the first instance, before the risk of a lawsuit was incurred; and the barrister who was consulted took care himself to examine into the evidence in order to avoid mishaps. "One thing," the Lord Keeper's biographer observes, "was principally his care, which was to take good instructions in his chamber. He examined carefully the issue, as the pleadings derived it, and perused all the deeds if it were a title, and not seldom examined the witnesses if it were a fact; by this he was enabled to make judgment of the cause, and to advise his client as to going on or not."² In another passage Roger North observes, "nor can I say upon my memory how many families of nobility and others, having once made use of his advice, made him afterwards arbiter of all their concerns."³

From the insight into the manners of the seventeenth and eighteenth centuries, which contemporaneous dramatists and poets afford, ample proof exists that during that period clients were in the habit of retaining and consulting counsel directly. Wycherly, who was educated for the Bar, and for many years a resident in the Temple, draws, in "The Plain Dealer,"⁴ a humorous picture of a litigious widow, with suits in every Court in Westminster Hall, instructing her counsel personally, and evidently annoyed at a solicitor offering his services to one so capable as herself of choosing her own counsel.

Steele, who, although not himself bred to the Law, lived much amongst lawyers, affords another instance of the then professional practice, in his comedy of "The Conscious Lovers," where Mrs. Sealand's counsel, Serjeant Target, and her intended son-in-law's, Counsellor Bramble, are made to meet at her house to arrange the preliminaries for the marriage settlement.

Further instances may be found in the "Spectator," and in other works of the period. Pope shows the then prevalent

¹ P. 34.² P. 46.³ P. 55.⁴ Act III. Sc. 1.

practice, in his imitation of Horace, inscribed to Mr. Fortescue, an eminent barrister :—

“Tim’rous by nature, of the rich in awe,
I come to counsel learned in the law ;
You’ll give me as a friend both sage and free
Advice (and as you used) without a fee.”

The story of Sarah, Duchess of Marlborough, sending to her counsel, Mr. Murray (afterwards Lord Mansfield), a retainer with a fee of a thousand guineas, of which the future Chief Justice returned the Duchess 995, with an intimation that the “professional fee with a general retainer could neither be less or more than five guineas,” is well known.

These instances, and they might be multiplied to almost any extent, prove to demonstration that the present practice is of comparatively recent origin. In early times it was utterly unknown ; at a later period it was only partially recognised ; and even during the last century it was not fully established. It is, therefore, girt about by no halo of antiquity, and it must stand or fall by its own intrinsic merits.

Your Committee further find, that even during the present century, and at the present moment, the ancient practice, which allowed the client to communicate directly with his counsel, has not been wholly discontinued. Numerous well-authenticated anecdotes which have come to their knowledge satisfactorily prove that very many eminent barristers, who are either still living, or who have only recently died, have availed themselves of that practice. Lord Brougham may be mentioned as a striking example ; for in the year 1824, when he was a leader of the Northern Circuit, and was threatened with loss of practice by a combination of attorneys opposed to his schemes of Law Reform, he defeated that combination by publishing his intention of affording his counsel and advocacy to such lay clients as should directly seek his aid. In this resolution he was supported by the Circuit, who, with a view to relax any contrary rule of etiquette, directed their records to be searched, when no trace of any such rule was found to exist. The present Lord Chancellor is also known, at least on one remarkable occasion, to have advised a client, and that client a lady, without

the interposition of any attorney; and the late Mr. Baron Richardson, when at the Bar, repeatedly communicated with mercantile men, who came direct to consult him on legal questions of delicacy connected with their affairs. The late Lord Abinger, too, whom few men will think of charging with unprofessional conduct, is known on several occasions to have given his advice to, and received his fee from, clients, without any intervening attorney; and one instance is particularly remembered from the fact, that the advice was given, and the fee received, in a room in Brookes' Club.

With respect to the limits of the supposed rule of etiquette, your Committee have been unable to obtain any precise information. On the one hand, some members of the Bar have stated that they consider it inconsistent with "etiquette" for a barrister in London to receive papers from a country attorney, unless they come through his London agent; but on the other, your Committee have been assured, by gentlemen of high reputation as lawyers, that they do not consider it unprofessional to aid the public by advice, without the intervention of an attorney; and, indeed, some gentlemen have intimated their opinion that barristers are not, under ordinary circumstances, justified in refusing to clients their professional aid, either as counsel or as advocates, though no attorney be engaged. The attention of your Committee has been also called to the well-known fact, that in criminal cases counsel are constantly retained without the intervention of an attorney, and that wills and settlements are frequently drawn under instructions received directly from the client.

Such being, as far as your Committee have been able to ascertain, the actual relation at present existing between barrister, attorney, and client, in the conduct of legal business, they now proceed to consider whether any alterations may be made therein with advantage to the public; and the first question to which they will address themselves is, whether clients should be permitted to consult or retain barristers, either as chamber counsel or as advocates, without the intervention of attorneys. In other words, is it expedient that the present practice should be annulled?

Now, the arguments in its favour appear to be the follow-

ing; first, it is contended that it has the effect of preserving the dignity of the Bar; next, that it insures the independence of that body; and thirdly, that it promotes its morality. It is then urged, that the abolition of the practice would be greatly injurious to attorneys; that it would violate a tacit understanding between the two branches of the Profession, and would thus be inconsistent with good faith; that it would cause an unseemly squabble between barristers and attorneys; that it would not benefit the public, as barristers would be unable, without the assistance of attorneys, to elicit the real facts from clients; and as clients would be unable, without the like assistance, to ascertain the competency of barristers; and that, notwithstanding the abolition, the legal business of the country would continue to flow in the same channels as at present. Your Committee believe that the above is a fair statement of all the reasons advanced by those who are opposed to any relaxation of the existing practice; but as they have not in their deliberations had the assistance of any of those members of the Society, whose position as attorneys would have rendered their co-operation most valuable, it may possibly turn out that the arguments in favour of the present system, as stated in this Report, may be less complete than they would otherwise have been.

Reverting, however, to the arguments themselves, your Committee confess that they have not been much struck with the force of any of them. The diminution of the dignity of the Bar can scarcely be placed in competition with the interests of the public; and, even were it otherwise, it would be difficult to discover how a barrister's dignity can be diminished by enabling him to communicate directly with his client. The maxim "*omne ignotum pro mirifico*" may possibly find some countenance in the courts of princes, but there is little cause for fear lest the familiarity induced by an interview between a suitor and his counsel should breed contempt. The true dignity of barristers is co-extensive with their utility; and no measure which increases the one can diminish the other.

Neither could the independence of the Bar be placed in any jeopardy by abolishing the present practice.

It is not very easy to understand the exact meaning of the assertion, that the more direct access of the client to the barrister will compromise his independence. In one sense, no professional man can be said to be independent, since all must ultimately rely on the favour of a public more or less extended. In this sense, the alteration of the practice will leave the position of the Bar as it found it. If, on the other hand, it be meant that the alteration of the practice will reduce the social position of the barrister below its present grade, no apprehension can be more unfounded. The independence, in this sense, of a profession, is regulated chiefly by the number of persons in whom its patronage is vested. If these be numerous, it is comparatively a matter of indifference to offend any of them; if few, their displeasure must be averted at any cost. So long as authors relied on patrons, they were a servile and dependent class; but since they have found that the best patron is the public, they have risen in self-respect and position. Precisely the same reasoning applies to the Bar. So long as they look only to a single class for employment, their independence is exposed to many dangers; but the moment they are brought into contact with the public, they have a resource against any sinister influence in an appeal to its sympathies, such as was so successfully made by Lord Brougham.

Those who think that the present practice is favourable to the morality of the Bar, rely on the argument, that if fraudulent claims or defences are to be set up, witnesses tampered with, or any other species of mal-practice resorted to, it is now necessary to find both an attorney and a barrister who are jointly ready to lend themselves to such chicanery; whereas, under the supposed alteration, either one or the other will alone be sufficient. Unfortunately, this check is of little practical force. Unscrupulous practitioners are endowed with an instinct which enables them readily to recognise each other; and we fear that no dishonest scheme devised by a member of either branch of the Profession has ever miscarried from his inability to find a coadjutor equally unprincipled. Nay, the

compulsory employment in all cases of two legal agents, has a tendency to encourage such practices, by offering to them a sure prospect of impunity. It is easy for two men, without detection, and without absolute loss of character, to do things which one dare not attempt. The responsibility is divided and uncertain; it is easy to assume a convenient ignorance on dangerous points, mutual misunderstanding may be suggested, and in the last resort, each may throw the blame on the other; the barrister, if censured by the Court, on the attorney; the attorney, if accused by the client, on the barrister. From these considerations, it seems clear that the morality of the Profession runs no danger from the change.

It is then urged, that such a change would do much injury to attorneys, and would involve a breach of good faith and of the tacit understanding between the two branches of the Profession. A Committee of this Society can recognise no hardship towards individuals or professions as competing for a moment with the public good. Whatever injury may be suffered by the attorney, will be precisely in proportion to the benefit conferred on the client. If the present system be best it will continue; if not, those who profit by it have no more claim to have it preserved for their benefit, than those whose interests suffer by the advance of science and discovery. Neither is there any breach of faith, since the present state of the practice is of recent origin, and arose, not from any compact between the two professions, but, as it is conceived, from a fastidiousness and over-refinement of feeling which induced the Bar to seclude themselves from the public, not with the view to increase the profits of attorneys, but in the mistaken idea of consulting their own ease and dignity. Nor is there any ground for fear lest the abandonment of the practice would lead to an invasion by the Bar of the peculiar province of attorneys, no encroachment by the Bar or any other class of persons on the exclusive privileges of attorneys being possible, so long as the Attorneys' Act, 6 & 7 Vict. c. 73. remains unrepealed.

Nor does there seem to be any reason for apprehension lest the change should engender unseemly squabbles between the respectable members of the two branches of the Pro-

fession. No liberal or right-minded barrister would regard with feelings of jealousy the success which an attorney had fairly won by his learning and his talents; and no attorney could reasonably take offence at the exercise by the Bar of their undoubted right to regulate their own practice, even though the result should be, that barristers should resume the privilege of acting as juriconsults, and should thus expose attorneys to a new, and it may be, a formidable competition.

It is next said, that barristers would be incapable of eliciting the requisite information from their clients. If this should be so, the change would be harmless, as the public would soon cease to consult men who could not understand them. There seems, however, no reason for supposing that such would be the case. It may be true that investigations requiring much time and patience could not be conducted in a satisfactory manner by the fully employed barrister, but the same observation applies at the present moment to attorneys in large practice; and it seems idle to contend, that the junior and less occupied members of the Bar would not be as capable of unravelling a tangled web of facts, and of discussing the real points in dispute, as those who belong to the other branch of the Profession.

Perhaps the most plausible of the objections which may be urged to the change is, that the client, if permitted to choose for himself, may select an ignorant or incompetent barrister as his legal adviser. The weight of this objection lies in the unfortunate fact, that owing to the neglect of legal education, the supposition of ignorance in a barrister carries with it no contradiction. Whatever be the merits of individual members, your Committee are painfully sensible that the status of a profession must depend on the terms of admission to its ranks, and that the public have been deprived of the guarantee against ignorance and incompetence, which the learned societies intrusted with the power of calling to the Bar ought to have afforded. In another part of this Report will be found recommendations intended to meet this serious evil. With reference, however, to the present objection, it must be remembered that the client has the deepest interest in selecting

a competent legal adviser — that many of the duties of a barrister are performed in public in the presence of professional rivals, and of a Court whose appreciation of intellectual ability is exquisitely keen — that the client is not obliged to depend on his own judgment, but can command, if he think fit, the advice of an experienced attorney; and that it is no part of the policy of the present day to fetter the liberty of private choice because it may not, as a uniform rule, be judiciously exercised. Nor is the existing system faultless; for interest, friendship, or family alliance, may warp the choice of an advocate by an attorney, just as ignorance and inexperience may mislead the client. While neither method is wholly free from objection, their necessary imperfections will probably be best met by leaving the alternative open. An additional safeguard will be found in the suggestion contained in another part of this Report, for rendering the barrister liable for gross negligence or ignorance.

Lastly, it is sometimes argued that the change is not worth making, because it will produce no effect. Business, it is said, will continue to flow in its present channels, and the Bar will be utterly unable to regain the ground which it has now for some years voluntarily abandoned. Without stopping to inquire how far this argument is consistent with the complaint of hardship before disposed of, your Committee will proceed at once to answer it by adducing those reasons which, in their opinion, show that the change will be great, because its results will be highly beneficial.

The following are the reasons which appear to show the expediency of allowing the client to consult counsel without compelling the intervention of an attorney: —

1st, such a proceeding will be less expensive; 2ndly, it will be more expeditious; 3rdly, the advice will be less likely to be founded on error as to fact; 4thly, secrecy will be more effectually attained; 5thly, the independence of the Bar will be better secured; 6thly, nepotism among attorneys will be discouraged; 7thly, the Bar will be placed more under the influence of public opinion; 8thly, an honourable competition between the two branches of the Profession will raise the intellectual and moral standard of each; 9thly, the law will

be studied in all its branches; and, lastly, the profession of jurisconsult will regain the position from which it has been improperly degraded.

On the question of expense it is unnecessary to enlarge. It is quite evident that wherever a barrister is resorted to in the first instance, the expense of preparing a case for his opinion, usually much larger than his fee, will be saved to the client. If it be apprehended that a barrister much consulted by clients would probably raise his fees, it must be remembered that in so doing he will expose himself not only to the competition of his own profession, but of the attorneys also, and that such increased remuneration can, under these circumstances, only be attained by extraordinary merit. The mere superfluity of practitioners, the existence of a large number of barristers without practice, and of attorneys without business, has not hitherto rendered advice any cheaper to the public. It remains to be seen whether the competition of professions may not achieve that which has not resulted from the competition of individuals. In this, as in most other matters, the analogy of the medical profession affords a safe guide, since no one can doubt that the competition of its different branches greatly tends to secure the moderation of its charges.

The greater expedition of the direct resort to counsel is also too plain to require much comment. In these days of rapid motion and instantaneous intelligence, conjunctures must often arise, in which the immediate access to the best advice, without preliminary forms or proceedings of any kind, must be invaluable to clients. Many matters of business will as little bear delay as matters of health; nor is it easy to estimate the amount of gain, both to the Public and the Profession, that will arise from breaking down the delays which have in so many instances interposed an insurmountable barrier between them.

As regards safety, the presence of an intermediate agent between counsel and client is of itself a cause of many errors; and is frequently an obstacle to the discovery of truth. The preparation of a case often falls upon the attorney's clerk, and is little more than his revision of the

notes taken, or instructions given, by his employer. It is, in fact, a copy of a copy, exposed to all the objections which apply to hearsay or secondary evidence. Considering how such things are almost necessarily prepared, it cannot be wondered at that all the material facts should not always be disclosed, and that counsel should often be obliged to assume alternative states of fact in order to give any opinion at all, — a necessity which would be obviated by a single question put to the client himself. The inconvenience of entrusting one party with the statement of a case to be answered by another is shown by the numerous miscarriages of special cases stated for the opinion of our Courts, which have been decided on grounds beside the merits, from the want of some fact overlooked by the skilful counsel who framed them, but considered by the Court essential to the decision. Another source of safety would be found in the allowing counsel themselves to examine the witnesses whom they are to produce in Court. Such a practice would render it impossible for barristers, without loss of character, to open cases, unsupported by evidence, on the faith of their instructions, and would impose upon them the salutary responsibility of ascertaining that the statements to which they give publicity are not mere surmises or malicious inventions. To lend such aid to justice, and to throw such a protection over private character, would raise the Bar in public estimation, and increase the sphere of its utility.

Secresy is in many cases so valuable to the client, that he will rather forego the advice he needs than risk publicity. Mercantile credit and female honour may, under the present system, be exposed to the comments of the very numerous persons through whose hands the business of an attorney in large practice usually passes. When the best advice can be had without committing anything to paper, or trusting any one except the person consulted, the advice of the learned will be placed at the command of the public in many cases, in which it has hitherto been practically inaccessible.

Such a change will also confer on the Bar an independence of position which can never be enjoyed by those who look exclusively to another profession for advancement in

their own. The barrister, conscious that there is a public open to him beyond the narrow legal circle in which he has hitherto moved, will have the less temptation to descend to unworthy arts and compliances, and may with more confidence rely on his reputation for character and ability to compensate the want of professional connexion.

Nor will such a change be without a salutary effect on the manner in which attorneys dispose of the patronage entrusted to them on behalf of their clients. The temptation of all who have much to give away is nepotism, and whether the object of desire be a brief or a place, there will always be a tendency to bestow it on other grounds than purely meritorious ones. By in some degree diminishing the power of one part of the Profession over the destinies of the other, we render it less likely that men will be brought forward by interest alone; and by bringing the barrister in contact with the public, we submit him to an impartial tribunal which will view him with other eyes than those of relatives and connexions.

The same change will correct to some extent an evil much complained of in modern times, the imperviousness of the Bar to the influence of public opinion. Provided he stands well with those to whom he looks for employment, a barrister has little pecuniary loss to apprehend from shocking the moral sense of the public. He may misstate evidence, misquote or suppress authorities, and accuse the innocent to shield those whom he knows to be guilty, without incurring any loss which money can measure. But once bring him into immediate contact with the Public, and he will be made to feel the pecuniary worth of character, and the necessity of satisfying, not merely a zealous or malicious client, but those who form the audience in, or read the proceedings of, Courts of Justice.

Not merely would the competition between the two professions render advice cheaper and more accessible to the public, but it would also render both professions more worthy and more able to give it. Men would soon discover from which quarter the more honest and safe advice was to be obtained; and the less popular branch, whichever that might

be, would be stimulated by an honourable emulation to surpass its competitor. From such a struggle would arise, not only an improved intellectual culture, but a wish to banish disreputable practices, and to raise the standard of morals and learning to the highest attainable point.

Another result would be, that persons liable to be called in to advise unlearned clients, would be compelled to study the Law in a more comprehensive spirit; and instead of devoting their whole minds to a single department—Law to the exclusion of Equity—or Equity to the exclusion of Law—or Pleading to the exclusion of either,—would treat our jurisprudence as a connected whole, and free themselves from that narrow spirit which has so long retarded the most necessary changes.

Lastly, the proposed change would restore to the Bar their fair share, to be decided by public competition, of the office of juriconsult,—an office that involves the highest duty which the practising lawyer can be called upon to perform. To argue, to persuade, to convince, are the functions of the mere advocate; but to advise, has in it somewhat of the judicial office, and requires an union of comprehensive knowledge, discretion, and integrity. Believing that the Bar have acted unwisely, both with reference to the public interest and their own, in withdrawing from the exercise of this part of the legal Profession, your Committee recommend, that the practice they have been considering should be discontinued, and that henceforth it should be open to clients to consult counsel without the intervention of an attorney.

A question, very nearly related to that just considered, is raised by the provision of a recent statute, 9 & 10 Vict. c. 95. s. 91., which forbids the employment of the Bar in the County Courts without being instructed by an attorney.

The first objection to this enactment is, that it deprives the Bar of the Common Law right which *Doe v. Hale*¹ has established, and for the first time assumes to regulate by Act of Parliament the etiquette of the Profession.

A second objection is the unfairness of the competition to which the Bar is subjected, by being obliged to receive instructions from a competitor, who may, if he please, retain

¹ 15 Q. B. Rep. 171.

the brief himself, and naturally will do so in the great majority of cases.

A third and more important objection is, that by this means the employment of counsel is rendered needlessly expensive in Courts formed to administer cheap justice, and the public is deprived of all benefits accruing from the competition of the two professions, by an Act which forbids it to seek the one except through the intervention of the other. For these reasons your Committee recommend that application be made to Parliament to repeal the clause in question.

Your Committee have carefully considered the question whether attorneys should be permitted to act as advocates in the Superior Courts, and have to report that such a change in the present system would be highly prejudicial to the public. If attorneys were empowered to assume the functions of counsel, and at the same time to preserve their own peculiar statutory privileges, they would obviously be in a position to establish an absolute monopoly both of legal agency and of advocacy. By a judicious distribution of duties among the different members of an attorney partnership, the firm would be enabled to dispense entirely with the assistance of the Bar; whilst a barrister could receive his instructions only from the client or his attorney, and could neither by himself, or by a partner, or by a clerk, perform any of those duties which are now exclusively entrusted to the attorney by statute. If, however, on effecting this change the statutory privileges of the attorney should be abolished, one of two events must ensue, viz., either a fusion of the two branches of the Profession would take place,—every barrister being enabled to act as an attorney, and every attorney to act as a barrister,—or the professional lawyer would be altogether abolished, and any person whom the suitor might choose to select would be enabled to act in the capacity of attorney, legal agent, counsel, or advocate. Your Committee are persuaded that either of these results would produce far greater evils than any now existing. It is clear that in any event the Bar, as a separate profession, would be destroyed; and the question, therefore, whether attorneys should be permitted to act as advocates in the Superior Courts really resolves itself

into this, would it be for the public advantage that the Bar should continue to exist as a separate profession? Now, it seems quite clear, from the terms of the reference, that this is a question which the Society never intended to be raised at all; but even were it otherwise, your Committee are clearly of opinion that the Bar should be preserved as a separate profession, not on the ground of the division of labour, as that must obtain under either system, but on account of the wholesome check which barristers and attorneys must reciprocally afford to the conduct and charges of each other. The public derive the greatest benefit from the analogous division of the medical profession into physicians and apothecaries; and this benefit is undoubtedly to be ascribed to the competition which exists between the two branches of that profession.

Your Committee have next considered whether any alteration should take place in the existing regulations with respect to attorneys becoming barristers, and barristers becoming attorneys. And first, every attorney, who is desirous of coming to the Bar, must, previously to entering an Inn of Court for that purpose, remove his name from the Rolls. He must then, like any other student at law, keep twelve terms; and after his name has been for three years on the books of the Inn he becomes eligible to be called. This rule, which now prevails uniformly in the four Inns of Court, is of very recent origin, the rules of the several Inns upon this subject having varied much at different periods. Previously to the reign of Philip and Mary no settled rule seems to have prevailed; and from several old authorities it appears that attorneys who had performed the necessary exercises were called to the Bar immediately on ceasing to act as attorneys. During that reign a rule was established, "that no common attorneys should be admitted into commons;" but this was not strictly observed, and until within the last few years, attorneys were frequently admitted into the several Inns, and allowed to keep their terms while practising as attorneys, though they could not be called to the Bar till two years had elapsed from the removal of their names from the Rolls. Your Committee consider that the existing rule upon this

subject is unnecessarily harsh, as, without any corresponding benefit, its obvious effect is to deprive every attorney, who wishes to become a barrister, of three years' professional life. Such a rule does not exist in the case of officers of the Army or Navy, who are desirous of being called to the Bar, and there seems to be no good reason why it should prevail in the case of attorneys. Indeed, the connection between the qualifications and course of study required for the two professions is so close, that every facility should be given for transition from one to the other, and for the application of talent to that department for which it seems best adapted. The interval of three years was no doubt interposed, in order to prevent the attorney from carrying with him to the Bar the connection formed in his previous practice; but as all other indirect modes of obtaining business are by law left open to the barrister, to prohibit this one seems needlessly oppressive. Your Committee, therefore, recommend that an attorney desirous of being called to the Bar should, if in other respects a fit person, be admissible into an Inn of Court for such purpose, without previously removing his name from the Rolls—that he should be permitted to keep his terms without discontinuing his practice; but that his name should be removed from the Rolls before his call to the Bar. Secondly, every barrister who is desirous of becoming an attorney, must first be voluntarily disbarred, before he can enter into articles of clerkship with a view to being admitted on the Rolls. The two conditions of barrister and attorney's clerk, are so manifestly incongruous, that your Committee do not suggest any change in this respect.

The present state of the law on the subject of the legal liability of barristers is somewhat uncertain. It is, indeed, tolerably clear that if a barrister be guilty of collusion, deceit, extortion, or other mal-practice in his profession, he is punishable by attachment either at Common Law or by Statute.¹ It would seem also, from some old authorities, that Courts of Equity have the power of summarily fining, or otherwise punishing counsel, who draw pleadings which con-

¹ 6 Mod. 137.; 2 Hawk. P. C. c. 22, s. 30; Westm. i. c. 29., passed in 1275.

tain criminal, impertinent, or scandalous matter.¹ But the difficulty is to determine in what cases an action may be maintained by a client against a barrister for misconduct. Lord Kenyon has ruled at *Nisi Prius*, that no action will lie against a counsel for gross negligence or ignorance in settling pleadings²; and the same learned Judge has decided that a fee given to a barrister to argue a cause which he did not attend, could not be recovered by the client in an action for money had and received.³ But in neither of these cases was any notice taken of the numerous instances mentioned in the old books, where the principle is clearly admitted that counsel are liable for misconduct, on the ground either of *crassa negligentia*, of breach of confidence, or of breach of contract to attend to a client's cause, and that where detriment arises to the client from such misconduct, an action of deceit or *assumpsit* lies.⁴ Your Committee are of opinion that all doubts upon this important subject should be cleared up by the Legislature, and that a declaratory enactment should be passed in conformity with the ancient rule of law. They can discover no valid reason why counsel should be less responsible to their clients than attorneys, and they feel persuaded that the immediate effect of such an enactment as they suggest, would be to stop the practice, which has become of late years very prevalent among Common Law barristers engaged in large business, of taking briefs without any reasonable probability of being able personally to attend to them.

With regard to the law of liability of attorneys no ground appears for suggesting any alteration.

Your Committee, having felt that a review of the existing relation between the barrister, the attorney, and the client, would be incomplete without some notice of the system of education for the Bar, and of the institutions regulating the

¹ Mitford on Pl. 39. 3rd ed.; Rules and Orders of Ch. 93.; Viner's Abr., tit. Counsellor, A. 5.; *Fell v. Brown*, 1 Peake's Rep. 96., per Lord Kenyon.

² *Fell v. Brown*, 1 Peake's Rep. 96.

³ *Turner v. Philipps*, 1 Peake's Rep. 122.

⁴ See Vin. Abridg., Action (*assumpsit*), P. 6, 7, 8; (*Deceit Case*), P. b. 9, 10, 11, 12.; Counsellor, A. 6.

discipline of its members, deem it necessary to point out some defects in the present system, and to make some suggestions for its improvement. No profession can be looked upon as properly organised, which does not, from the force of its own constitution, afford the means both of training its students to a scientific knowledge of their future pursuits, and of maintaining its fair reputation and the honour of its members.

How greatly these important ends are neglected in the present state of the Bar is shown by a brief review of the functions of its governing bodies. The benchers of the Inns of Court, and the Messes of the different circuits, alone pretend to exercise any jurisdiction over the morals of the Profession. The duties of the latter are chiefly confined to imposing fines for trifling breaches of etiquette; and the only real punishment in their power,—that of exclusion from the mess,—is obviously inadequate to restrain more grave offences. The benchers of the several Inns exercise occasionally the power of rejecting applicants for admission to the Bar, and of disbarring barristers for misconduct; but this severe sentence is passed only on those who have been guilty of offences of the most serious character. The task of repressing unprofessional conduct, and of discountenancing improper practices, is therefore virtually left to the general opinion of the Profession; a tribunal always uncertain, and often misinformed. The duty of properly educating students for the Bar devolves wholly on the benchers of the Inns; and although this was certainly one of the principal objects for which the Inns were originally established, it is one which in recent times has been almost entirely neglected. At the present day, three only out of the four Inns appropriate a scanty portion of their revenues to the furtherance of this object, by supporting in each Inn a single Lectureship; and it must be obvious to all men that this is a provision absurdly inadequate to carry out its ostensible purpose. It is the opinion of your Committee, that these evils would best be remedied by the establishment, or rather the revival, of a legal university on an efficient scale. Such a system was the especial care of our ancestors, in the earlier periods of legal history, as is abundantly proved by the number of subor-

dinate Inns then in active existence, and the lectures and exercises which then formed the most important part of a student's preparation for the Bar; while the immense number of students (no less than 2000) mentioned by Fortescue as frequenting the legal University, at a time when the population of England could hardly have exceeded one eighth of the present amount, is a sufficient proof of the success of an academical discipline. What the cause was, which in their opinion led to the decadence of the system, and to the growth and increase of the present abuses, your Committee will proceed to show.

There can be little question that the Common Law University, which our ancestors established on the banks of the Thames in order to counteract the exclusive influence of those more ancient institutions on the Isis and the Cam, where the principles of the civil law were alone inculcated, was originally framed on the same plan as that of its elder rivals; that is, in addition to a number of subordinate, but, to a certain extent, independent colleges, there was a central body, which alone exercised the right of conferring degrees, of appointing professors, and of regulating the general discipline of the place. This body is known at Oxford and Cambridge by the name of the University, and it claims to examine the students, *sua auctoritate*, before granting them their degrees, while it leaves to the colleges the task of housing the undergraduates, and of providing for their previous instruction. The history of the University of Oxford shows the importance of this central authority, and the ill effects of its functions falling into disuse. At no very remote period, the degree there became, from the neglect of the University authorities, almost an empty name, as far as any examination was concerned. The colleges, in consequence, grew lax in the education of their students, and the required amount of scholarship was reduced to a nominal standard. When, at a subsequent period, the Heads of the University threw off their apathy, and insisted on a stringent examination of the undergraduates, before they would confer a degree, the colleges were soon forced to afford the means of adequate instruction, in order to retain the students

within their walls. A corresponding power of supervision over the Inns of Court was possibly in former times exercised by Serjeants' Inn; but be this as it may, there is no question that the Judges alone held the power of conferring the degree of barrister, — a power which is still vested in them, though for a long time past it has been delegated to the Benchers of the several Inns. This abandonment of their authority by the Judges has produced, but in a greater degree, the same evils as were engendered at Oxford from a similar neglect. The Inns of Court (which resemble the colleges at Oxford and Cambridge), exercising the anomalous power of themselves conferring a degree, have not only suffered the previous examination to fall utterly into disuse, but, as just stated, they have almost wholly neglected their more proper function of educating the students in legal science.

Your Committee believe, that the only remedy for these evils is to be found in the restoration of some central authority, similar to the governing bodies at Oxford and Cambridge, which may exercise an adequate control over the Inns of Court. They therefore suggest, that a Senate, composed of Barristers to be chosen by election, should be established to regulate the practice and maintain the honour of the Profession; that the power of conferring the degree of barrister should no longer be delegated to the benchers, but that it should be resumed by the Judges; and that a public examination should be instituted, under the control of the central authority, which every student must pass prior to his call to the Bar. In these days it can no longer be endured that barristers alone, of all professional men, should be permitted to practise, albeit they may be utterly ignorant of the first principles of the science which they undertake to explain and administer. No man can enter into the church, the army, or the navy; no man can become an attorney, a physician, a surgeon, or an apothecary; no man can even be the master of a merchant ship, without being first subjected to an examination, which, at least, furnishes some test of his professional knowledge; and it is idle to attempt to contend that rules, which have been

established by universal consent for the purpose of excluding the incompetent and ignorant from all other professions, should not apply with equal force to the important profession of the Bar. No profession can guarantee any higher qualifications than those possessed by its least competent members; and if the Bar is to maintain its present position among the institutions of the country, those qualifications must be raised, at least to a respectable standard.

In offering these suggestions, your Committee have before their minds the system which, since 1830, has prevailed in France. There, a young man who adopts the Bar as his profession must study three years in an elementary school of law. He next enters himself as a *Stagiaire*, and for this purpose he must apply to the *Conseil de Discipline*, a body which is chosen by election out of the rest of the Bar, and which exercises a most beneficial control over the conduct of the practitioners, and the etiquette of the profession. After passing three more years as a *Stagiaire*, he must again apply to the *Conseil* for admission to the rank of *Advocate*, and has then to undergo such examination as it may appoint. Your Committee are informed that this system exerts a most beneficial effect on the character and status of the French Bar; and they believe that such a Senate as they have described would be the most fitting depository of the supreme power in the Profession, both as to rules of etiquette, and as to educational regulations. But, under any circumstances, they feel called upon to condemn the present system, under which the power of granting degrees is vested in the Benchers of the Inns, and has by them been allowed to degenerate into an empty ceremony, utterly at variance with the original constitution of our legal University.

Your Committee are aware that no reform can be considered complete that does not include a restoration of the educational functions of the Inns of Court,—the appointment of a staff of tutors or professors in each Inn, equal in ability and number to the instruction of all the students,—and the foundation of exhibitions and prizes as incentives to legal studies. But they believe that a reform of this kind would necessarily follow from the establishment of a public examination before

granting the degree, and from the moral force which such a body as a senate would exert upon the Inns of Court. Each Inn would then vie with the others in affording the best instruction as an inducement for students to enter its walls, and an honourable rivalry would be established among them similar to that which now animates the colleges of Oxford and Cambridge.

Your Committee, in closing their Report, submit to the Society the following resolutions :—

1st. That any practice which has a tendency to prevent the public from obtaining the assistance of counsel except through the *compulsory* intervention of an attorney should be discontinued.

2d. That so much of the 91st Section of the Act of 9 & 10 Vic. c. 95., as prevents a barrister from advocating the causes of suitors in the County Courts, “unless instructed by an attorney,” should be repealed.

3rd. That attorneys should *not* be permitted to act as advocates in the Superior Courts.

4th. That attorneys should be eligible to be called to the Bar without any intermediate cessation from practice.

5th. That counsel should be made responsible to their clients for *crassa negligentia*, breach of contract, and breach of confidence.

6th. That a legal University, composed of the Inns of Court, and governed by an elected Senate, should be established; and that such Senate should have jurisdiction in all questions concerning the discipline and conduct of the Bar.

7th. That all candidates for admission to the degree of barrister should pass a public examination.

ART. XIV. — FRANCE.

THE extraordinary but hardly unexpected changes which have taken place in France since our last Number was published, impose upon us the necessity of making some reference to the new aspect of things in that country, as far as its jurisprudence and judicial system may be affected by it. (See No. XX. pp. 87. and 91.)

An absolute government has now been established, upon the result of a general vote of confidence in the President; and he manifestly supposes that the people have given him a right to do exactly as he pleases in all respects whatsoever, though it is certain that only one of the questions he propounded to them was ever thought of for one moment by nine hundred and ninety-nine in every thousand who voted; namely, the question, "Will you have Louis Napoleon for ten years or not?" The reflecting part of the community were most probably, almost certainly, in the minority. However, so it is; and he has abolished all parliamentary government — all discussion in meetings — all discussion through the Press. He is, in many respects, more absolute than his Uncle; in some material respects more absolute than the Eastern Princes. More absolute than his Uncle, because he assumes to act in the name of the seven millions and a half who voted — that is, of the whole community: more absolute than Oriental Princes, because he has the divided responsibility arising from a mere semblance of a constitution. He is supported by two kinds of populace, — one armed, the other unarmed. To both he appeals on all occasions. It is a mob and military government, in every sense of the word; and it is an absolute government.

This is, no doubt, the melancholy result of the errors and the crimes of the last fatal revolution, that of 1848; and it has been brought about principally by the violent Republican party. The mistakes and the faults of other parties joined their influence in leading to this sad consummation; but the

Red Republicans are those mainly answerable for having inflicted upon France the loss of even the semblance of freedom. It is no business of foreign nations: they have neither the duty, nor the right, to interpose. We can not see either the duty or the right to interfere with the French by attacks upon an order of things which they have chosen for themselves; and if they have not chosen it, if it has been imposed upon them either by force or by fraud, or by a mixture of both, their neighbours can lend them little help, and certainly will do them no kindness by exulting over such misfortunes. Rather let us hope that some compensation may be found for loss of liberty, in sure, and vigorous, and wholesome administration. Those in whom the power is vested, and on whom the responsibility rests of its exercise, may endeavour to lighten the nation's burdens, by giving it good measures; above all, wise and enlightened reforms in its jurisprudence. The loss of free and effectual debate in the legislature, of full and unfettered discussion by the community, is irreparable. But out of the general evil may come a partial good: improvements in the Law will be more easily made; and if they are well devised, they would, in some sort, reconcile men to the new state of things.

We say nothing of the latest acts of the government, especially of the hardly credible Orleans confiscation; — a close imitation of the very Socialists, the terror of whose inroads upon property has mainly enabled the present rulers to sweep away all public liberty. We speak of the system and its tendencies; and we join in the hope that those who work it may be disposed to give some compensation to the community whose rights they have taken away.

We are now enabled to lay before our readers, in connection with this subject, a document of the highest importance. It is a letter from M. Dupin, one of the most eminent lawyers and statesmen that France ever possessed, giving in his resignation of his high office of Procureur-General.

This is one of the consequences of the extraordinary decree of Louis Napoleon — confiscating the property of the House of Orleans. This remarkable letter is another proof that the few respectable men who, for the sake of peace and

order, adhered to the President after the 2nd of December, now find the service of the State under his dominion to be intolerable.

We have received this letter from an eminent person now in Paris, who thus writes to us, under the date 25th January, respecting it:—

“ Here is a most important document—M. Dupin’s letter on resigning. He has given it me, at my request, for insertion in the ‘Law Review.’ Here, of course, no one dares to print a line of it. Even the simple notification of his having resigned, which had been put into the ‘Moniteur,’ was struck out by the Government Censor.”

We now print the letter, and have added a translation. Thank God! there is, on this side of the Channel, no danger of any imitation of this atrocious violation of the rights of property. The Act of 1799, giving George III. power to make a will of his private (but by law Crown) property, is with us a case in point. It shows the tender manner in which property so circumstanced is treated by our law.

“ Paris, le 23 Janvier, 1852.

“ PRINCE PRÉSIDENT DE LA RÉPUBLIQUE,

“ Je regrette vivement qu’avant de rendre le Décret que je viens de lire ce matin dans *le Moniteur*, vous n’ayez pas eu la pensée de m’entendre à ce sujet, avec cette bienveillance que vous avez quelquefois mise à m’écouter.

“ J’aurais essayé de vous démontrer, non pas seulement dans l’intérêt privé des enfans, la plupart mineurs, du feu Roi, dont je suis l’un des exécuteurs testamentaires, mais aussi dans l’intérêt de votre propre gouvernement, que ceux qui vous ont suggéré cette mesure, ne connaissaient pas les faits, et qu’ils ont méconnu toutes les règles du droit et de l’équité.

“ En fait, il y a une exagération extrême (elle est au moins de moitié) dans l’évaluation des biens de la famille d’Orléans.

“ En droit, elle viole *dans son essence* le principe même de la propriété.

“ Ce droit de propriété a été reconnu, après une discussion solennelle, dans la personne du feu Roi, par les articles 22 et 23 de la loi du 2 Mars 1832 ; et, dans la personne de ses enfans, par les actes mêmes de la Révolution de Février, par le décret de l'Assemblée Constituante du 25 Octobre 1848, et par la loi de l'Assemblée Nationale du 4 Février 1850, promulguée par votre gouvernement, et qui a autorisé l'emprunt de vingt millions hypothéqué sur ces biens et souscrit par votre Ministre des Finances.

“ Ainsi, droit public, testamens, lois spéciales, contrats, tout a reconnu dans la main des Princes de la Maison d'Orléans la propriété des biens que le Décret du 22 Janvier courant leur enlève d'un trait, et d'une manière si absolue, que le droit sacré des tombeaux, la sépulture de Dreux, n'est pas même excepté !

“ Si la Constitution du 15 Janvier était en vigueur, il y aurait lieu de réclamer auprès du Sénat, en vertu de l'article 26, “qui permet à ce corps ‘de s'opposer à la promulgation des lois qui seraient contraires à l'*inviolabilité de la propriété*.’”

“ Dans l'état présent des choses, on ne peut réclamer qu'auprès de vous, Prince, en invoquant la sagesse et l'élévation de vos propres sentimens interrogés de nouveau et mieux écoutés.

“ Mais, si ces mesures rigoureuses doivent être maintenues, un grand scrupule s'élève au fond de ma conscience.

“ Procureur Général à la Cour de Cassation depuis bientôt 22 ans ; principal organe de la loi près de cette Jurisdiction Suprême ; chargé par le gouvernement de proclamer incessamment le respect du droit, de requérir la cassation ou l'annulation des actes qui violent les lois ou qui constituent des incompétences ou des excès de pouvoir, comment pourrais-je le faire désormais avec assurance si l'on introduit dans la législation des actes qui seraient en contradiction avec ces principes ?

“ Je crois donc devoir vous donner ma démission.

“ Mais ici, Prince, je vous prie instamment de ne pas vous méprendre sur le caractère de mes motifs.

“ Ma résolution n'emprunte rien à la politique :

“ Comme Président de la dernière Assemblée, je me suis tenu sévèrement en dehors de l'action des partis et de leurs funestes divisions ; me bornant à maintenir, autant qu'il dépendait de mes forces individuelles, les doctrines légales et morales sur lesquelles repose l'ordre essentiel des sociétés civilisées.

“ Après le coup-d'état du 2 Décembre, contre lequel il a été de mon devoir de protester ainsi que je l'ai fait, j'ai attendu le jugement du peuple interrogé par vous. Après ce jugement solennel, j'ai adhéré franchement au pouvoir immense qui en était sorti, le considérant comme la plus forte garantie qui pût s'offrir pour conserver ou rétablir tous les principes qu'un socialisme effréné avait compromis ou menacés. Et, comme fonctionnaire, mon concours vous était loyalement acquis.

“ Mais, en ce moment, et au point de vue du droit civil et du droit privé, de l'équité naturelle et de toutes les notions chrétiennes du juste et de l'injuste que je nourris dans mon âme depuis plus de 50 ans comme jurisconsulte et comme magistrat, j'éprouve le besoin de me démettre de mes fonctions de Procureur Général.

“ Veuillez agréer, Prince, l'expression de mes sentimens de respectueuse considération,

(Signé)

“ DUPIN.”

[TRANSLATION.]

“ Paris, 23 January, 1852.

“ PRINCE PRESIDENT OF THE REPUBLIC,

“ I regret exceedingly that, before making the decree which I have read in this morning's *Moniteur*, you did not think proper to consult me on the subject, in accordance with that kindness with which you have sometimes listened to me.

"I should have endeavoured to prove to you, not only as respects the private interest of the children (for the most part minors) of the late King, of whom I am one of the executors, but also the interest of your own government, that those who have suggested this measure to you do not know the facts, and that they have disregarded every rule of law and of equity.

"In fact, the property of the Orleans family has been extremely over-valued, to the extent of at least one-half.

"In law, this measure violates *essentially* even the very principle of property.

"This right of property was recognised, after a most solemn discussion, in the person of the late King, by Articles 22 and 23 of the law of March 2. 1832; and in the persons of his children by the acts even of the Revolution of February, by the decree of the Constituent Assembly of Oct. 25. 1848, and by the law of the National Assembly of Feb. 4. 1850, promulgated by your government, which authorised the loan of twenty million francs upon the security of these possessions, and with the concurrence of your Minister of Finance.

"Thus public law, wills, special laws, contracts, have each recognised the Princes of the House of Orleans to be the possessors of the property of which the decree of the 22nd of January deprives them at one sweep, and that too in a manner so absolute, that even the sacred right of the tomb, the sepulchre of Dreux, constitutes no exception!

"If the Constitution of Jan. 15. were in force, redress might be sought from the Senate in virtue of Art. 26., which empowers that body to 'prevent the promulgation of laws contrary to the principle of the *inviolability of property*.'

"In the present state of things, there is no appeal but to you, Prince, by invoking the wisdom and elevation of your own sentiments, reconsidered and better understood.

"But if these rigorous measures are to be persevered in, I cannot but experience the most conscientious scruples.

"Procureur-Général to the Court of Appeal for nearly twenty-two years; principal organ of the law in respect of this supreme jurisdiction; charged by the government to proclaim continual respect for the law, and to procure the reversal or annulling of acts which violate the laws or which constitute the improprieties or the excess of power, how could I at any future time exercise my functions with confidence after the introduction into legislation of acts so little in accordance with these principles?

"I therefore feel bound to give in my resignation.

"But let me entreat you earnestly, Prince, not to mistake the character of my motives.

"My resolution has no political signification.

"As President of the last Assembly, I held myself entirely aloof from the strife of parties and their lamentable divisions; confining myself to the maintenance—as far as it depended upon my individual power—of those legal and moral doctrines which are the foundation of order in civilised societies.

"After the *coup-d'état* of the 2nd of December, against which it was my duty to protest in the manner I have done, I waited for the decision of the people required by you. In consequence of this solemn decision, I gave my frank adhesion to the immense power which sprang from it, considering it to be the safest guarantee that could be offered for the preservation or re-establishment of those principles which unbridled Socialism had compromised or menaced. And as an official my honest assistance was assured to you.

"But now, inasmuch as this measure affects civil law and private right, natural equity, and every Christian notion of right and wrong which, as a lawyer and as a magistrate, I have cherished in my heart for more than fifty years, I feel compelled to resign the position of Procureur-Général.

"I pray you, Prince, to receive the expression of my sentiments of respectful consideration.

(Signed)

"DUPIN."

ART. XV.—THE LAW AMENDMENT SOCIETY: ITS
PROGRESS AND PROSPECTS.

Reports and Papers of the Society for promoting the Amendment of the Law. Printed by Spottiswoodes and Shaw, and sold at the Office of the Society, 21 Regent Street: 1844—1852.

IN the earliest days of the Law Amendment Society, when one of its most zealous promoters was speculating on its chances of success, and complaining of the slowness of the Public to appreciate its advantages, he was thus consoled by the friend to whom he thus confided his fears, the late Master Duckworth, a sound Law reformer, and a worthy man: "Wait a little, my dear S——; don't be impatient. Nothing worth having is done in a hurry, especially no Law reform. The first symptom of your having made any way, will be when people begin to say, 'Law Amendment Society! What is that confounded Law Amendment Society?'" This point of progress we think has now been reached. People are beginning to ask "What is this Law Amendment Society?" and as we have the means before us of answering this question, and, as one of its off-shoots, feel it our bounden duty to render it suit and such service as we can, we shall endeavour to state shortly its origin and history, and to inquire, not only in what way it has already assisted the cause of Law Reform, but where, as it appears to us, it may become an instrument of much general usefulness.

The London Society is now, although founded only in the year 1844, successful. It has become one of the Institutions of the Land. Its plan is adopted by other towns and countries; but it will be found, as in most other examples of success, that a variety of circumstances combined to secure it. The difficulties in the way of its formation it must be admitted were considerable.

The Society, in the first place, invited the Profession of the Law to reform itself; to use the skill and knowledge which

its members had acquired, for the benefit of the Public ; and not only to do this, gaining no tangible benefit to themselves, but possibly to their immediate injury. It invited the lawyers so far to forget all past traditions and existing practices ; and not only to work for no pay, but at a possible loss ; nay, if some persons were to be believed, to follow the road which led to the destruction of the whole craft. The Society said to the Profession, " You know the Law, you have been bred up in its mysteries, you can step within the wheels of this complicated piece of machinery without injury ; you know how to use its powers ; employ this knowledge for the benefit of the Public : without your help, they dare not approach it ; with some, it is an Idol ; with others, a Demon ; with all a Terror ; its high priests can alone know how to render it a blessing. Do this, although you diminish or even entirely sacrifice the offerings to the shrine."

But the Society addressed at the same time the Public : " You are in want of Law—it is a necessity ; we have invited the lawyers to reform it, but they may be at fault, they may be prejudiced and narrow-minded, come and assist them in amending it, or, at all events, tell them what you want."

How this appeal was answered may be seen by the list of members of the Society which is usually to be found annexed to the advertisements of this Review. The Society already comprises not only many eminent lawyers (among whom we are particularly glad to see most of the rising young men), but many leading statesmen and merchants, and its ranks are receiving constant accessions.

Let us see then what this Society has done, and what it has attempted ; for the attempt, it should be remembered, is worth something. The mere name of a " SOCIETY TO AMEND THE LAW " has its use. It argues forcibly that the Law requires amendment. Inquiry is stimulated, and a rallying point is found for those who are disposed to investigate the needful reforms. Inquiry may thus take place, but inquiry only ; a foundation may thus be laid for legislative action or interference ; or so far as any evil can be corrected by the force of argument and public opinion, these may be brought to bear upon any proved abuse or evil ; but otherwise nothing

can be done. The proceeding therefore is safe and cautious, even where it obtains the complete sanction of the Society; but before this can be obtained, much preliminary investigation must take place before one of the Committees of the Society. These are either Standing Committees, appointed to consider some particular branch of the Law, as Equity, the Law of Property, &c., or Special Committees, to whom some particular subject is delegated by the Council or the Society.

These Committees have one great advantage; not only are they selected with a view of collecting together the members of the Society the best qualified to assist in the particular inquiry, but they are practically open to any member of the Society disposed to give any information or opinion respecting the subject before the Committee. The Report is then laid before the Society, and usually printed; and is then made the subject of discussion on a future evening, when it is *received*, and in this modified form, and in this only, is the sanction of the Society given to it.

The right line is thus drawn between a purely scientific subject and the obtaining a practical object. Errors are likely to be corrected, and it has not unfrequently happened that a Report has been referred back to the Committee with some special instructions. A subject is not only thoroughly sifted and investigated, but is exposed to considerable and discriminating criticism from many persons; and we are not surprised that in many instances it has been found that the Reports of these Committees have proved far more searching and valuable than the Reports of Commissioners appointed with more pretension and formality by the Government. This we shall see when we state the results of the labours of some of these Committees.

The Society has been chiefly engaged in recommending and supervising specific improvements in, I. The Drawing and Revising Acts of Parliament. II. The Procedure of our Superior Courts which has more recently included Plans for the fusion of Law and Equity Jurisdictions. III. The facilitating the Transfer of Land, and with this view the establishment of an efficient system of Registration of Titles, and the

simplification of the Law of Real Property. IV. The Improvement of the system of Legal Education, the formation of a Law School; and with this view the reform of the Inns of Court. V. The modification of the present Law of Partnership. VI. The improvement of the relation between Landlord and Tenant.¹ VII. The Enfranchisement of Copyholds. VIII. The readjustment of the relations between the Barrister and the Attorney, with a view to the advantage of the Client. IX. A better and more scientific mode of promulgating the Unwritten Law, and thus the improvement of Law Reports and Legal Publications.² X. The Improvement of the Treatment of Lunatics, and better mode of ascertaining the fact of Lunacy, and disposing of the property of the Lunatic when the fact is ascertained.³ XI. A better and cheaper Procedure as to Divorce; thus extending that remedy to the poor as well as to the rich.⁴ XII. The proper adjustment of the Expense of our Judicial Establishment.⁵ XIII. The treatment of Juvenile Offenders, and the whole subject of Reformatory Punishment.⁶ XIV. The Reform of the Law as to Evidence, and the admission of Parties as Witnesses.⁷

These are some of the subjects which have engaged the attention of the Society. The list is sufficiently extensive, and in all of them progress has been made. In some, the desired change has already been effected.

We shall notice particularly some of these heads.

I. THE DRAWING AND REVISING ACTS OF PARLIAMENT. There are, probably, few subjects connected with the Amendment of the Law, in which all persons, judicial or others, so heartily agree as in this. It has been often shown, that

¹ See Report, printed 7 L. R. 373.

² See Report, printed 10 L. R. 397.

³ See Report, printed 9 L. R. 313.

⁴ See Report, printed 8 L. R. 347.

⁵ See Report, printed 7 L. R. 361.

⁶ See Report, printed 5 L. R. 375.; 7 L. R. 79.

⁷ See Report, printed 8 L. R. 353. The important Act for admitting the evidence of parties—14 & 15 Vict. 99.—was expressly founded on this Report. Before attempting to have the Act passed, the Society took the evidence of the County Court Judges as to the manner in which the admission of this kind of evidence in these Courts had worked. These Judges, with one exception, gave testimony in favour of the change. See the answers given, 13 L. R. 395.

there is no necessary precaution taken to ensure the ordinary accuracy of a bill in Parliament.¹ If it involves no job or question relating to party politics, it may pass both Houses without any one knowing or caring any thing about it. There is no attempt at revision or supervision any where. If, on the other hand, it excites attention, the Committee is usually the stage at which the fight takes place; and here it is liable to be cut and carved at the discretion of any member disposed to suggest an amendment. These amendments are often thrust in wholesale in one House, and amendments made on them in the other, and the bill which passes entirely differs from the bill as introduced. If Parliament were willing to have its wishes put into concise and intelligible language at some time and place more adapted for this work than a Committee of the whole House, Public Acts of Parliament might at all events be as well drawn and intelligible as Private Acts, and we should be spared those allusions, which we so frequently hear, from the Bench, as to "*crude measures*," and "*hasty legislation*," which are now the too frequent theme of learned Judges after each Session has left its quarto annual for their amusement and edification. The Society made its first Report on this subject² recommending the appointment of Parliamentary officers to revise Public Bills.³

This proposal left a wide discretion in the proper authorities; but it may be suggested that at a time when the office of clerk of the Parliament, the chief clerk of the House of Commons, and the chief adviser of the Cabinet in legislative affairs are so filled as they now are by Mr. John S. Lefevre, Sir Denis Le Marchant, and Mr. Coulson, Q. C., ample means are readily available at all events for superintendence and direction of the highest character.

II. IMPROVING THE PROCEDURE OF THE SUPERIOR COURTS.—The procedure of the Superior Courts has, from its commencement, engaged the attention, and taxed the utmost powers of the Society. The Committee on Equity,

¹ See *antè*, Art. V.

² Printed 1 L. R. 134.

³ See the reasons stated for a different plan, *antè* Art. V. p. 310. *et seq.*

and the Common Law Committee, laboured hard in their several vocations to discover in what way suits might be simplified and cheapened in their respective Courts; and many valuable suggestions were the result which have appeared in the Reports of those Committees; the most important of which have been printed in this Review.¹ The Masters' Office has chiefly engaged the attention of the Equity Committee; and their labours have at length resulted in the adoption by the Society, on the 12th of January last, of the following important resolutions:—

1. "That the present practice of commencing a suit in Chancery before a Judge, of referring either the whole or any part of the matters involved in the suit to the Master, and of reporting the Master's decision to the Court for its ultimate determination, is the cause of the greater part of the delay and expense of Equity proceedings.

2. "That suits in Equity might be most advantageously disposed of by the Judges sitting in Court or Chambers, as might best suit the circumstances of the case."

These resolutions, which contain the germ of a most important reform, have at length, and after much previous discussion, received the assent of the Society. The Report, which explains the reasons for them, and the foundation on which they stand, will be found in this number. And at length we may state that the JUDGE-MASTER PRINCIPLE has prevailed. Let us say this in no unworthy spirit of exultation or triumph! But it may be permitted to us, after many years² devoted to the promulgation and development of this principle, to express our hearty satisfaction that it has received the assent not only of the Law Amendment Society but of the Incorporated Law Society³; and as we are in-

¹ See especially Report, 13 L. R. 328.

² See especially 6 L. R. 122.; 9 L. R. 1—22.

³ The adherence of this highly respectable Society is given in an elaborate Report of the Committee appointed by the council of the Incorporated Law Society. We regret that we have only room for one or two extracts, but these are well worth comparing with the Report of the Law Amendment Society, as showing how curiously both documents agree in their statements and conclusions, although drawn up without any concert:—

"The Masters' Offices call for the greatest attention, for to them, as at pre-

formed, of the Chancery Commissioners; and what is even more important, the present Equity Judges are willing to act as Judge-Masters. It would seem that it is in the power of the Court of Chancery itself to effect this great alteration,

sent constituted, is to be attributed a large proportion of the delay which has been charged, sometimes mistakenly, but often justly, upon Equity Procedure. One main defect in these subordinate tribunals is, that no sufficient or continuous control is exercised over the proceedings. When the superior Judge has heard the cause, and directed inquiries, he sees nothing more of the suit until it comes back to him, perhaps years afterwards, for further directions. The Master does not consider that any duty is peculiarly imposed upon him to expedite the proceedings; he is not bound to report by any given time; and all the steps in the suit become subject to the convenience or views of the parties. If no one should be desirous to proceed, the cause may sleep; if one party is anxious to proceed, and another party is desirous of delay, the want of vigour inherent in the present constitution of the Masters' Offices becomes painfully manifest, and innumerable obstacles are presented to any thing that deserves the name of progress. Besides this, the machinery itself, in the Masters' Offices, is in many cases uselessly expensive, and is not calculated to ensure expedition, even where all parties do their utmost to promote it. A further mischief attributable to the present system is the serious loss of time and money in the transmission of causes from the Court to the Master, and from the Master back again to the Court. An Order of Reference does not usually reach the Masters' Office in less than a month from the date; and when the cause is thus transmitted to a new tribunal, the Master must be put in possession of the case; he must know what he has to do, and the facts on which he has to decide. For this purpose a written statement is carried in before him, repeating the facts which have already been opened to the Court. When the Master has heard the case, made the inquiries, and taken the accounts directed, in which he is confirmed by the Orders of the Court within certain limits, and cannot adapt his proceedings to any new state of circumstances arising before him, he must transmit his decision to the Court, with the facts and evidence on which it is founded. This renders necessary a long report, in the preparation and settlement of which much time is consumed and much expense incurred, and this only for the information of the Court. Nor does the evil end here; for if exceptions be taken to the finding of the Master, they can only be heard by the Court in their turn as a cause, involving nearly as much expense as an original hearing; and where the exceptions prevail, they frequently render the Master's report, and all that has been done by him, useless.

"Nearly the whole of this delay and expense would be avoided by commencing and keeping the cause before one tribunal, and the Committee are decidedly of opinion that this should be done. No alteration in the practice can be effective, unless the business of the Master's Office be placed upon a different footing. There are two methods, as it appears to the Committee, of effecting this important object:—1. By retaining the cause before the Judge who originally hears it, the Judge sitting at Chambers, and himself superintending the necessary details, which should be committed to responsible

except perhaps, so far as the salaries of the necessary officers are concerned; but we apprehend that no difficulty would be made by the Legislature in giving any additional powers that were necessary.

It is not to be supposed that this important alteration in Equity Procedure was at once discovered and matured. It was only after long and careful discussion of the great evils attending the existing practice of the Court of Chancery, and more especially of the Master's Office, and many Reports thereon¹, that it appeared obvious that there was no

Officers, such as the present chief clerks of the Masters. 2. By giving the Masters, without any preliminary hearing in Court, *primary jurisdiction* in the majority of cases, and such powers as will enable them to work out a cause from the beginning to the end; their decisions to be subject, of course, to an appeal, under such regulations as may be deemed proper.

"During the last Session of Parliament a Bill, which originated with the body of Solicitors, was introduced into the House of Lords for the purpose of giving primary jurisdiction to the Masters in administration cases. It was believed at that time that it would not be agreeable to the Equity Judges to sit in Chambers; but upon the Bill being referred by their Lordships to a Select Committee, the Master of the Rolls and Vice-Chancellor Sir George Turner were examined as witnesses; and these Judges were understood to express their willingness to sit in Chambers. Consequently it may be considered that no personal objection on the part of the Judges now exists to the adoption of this course, which, in the judgment of the Committee, is decidedly the best. The Committee, therefore, recommend that the Master's Offices, as at present constituted, should be abolished;—that four new Judges should be appointed, one of whom should be attached to each of the present Courts of the Master of the Rolls and Vice-Chancellors, so that each Court should have two Judges;—and that each Judge should each week sit three days in Court, and three days in Chambers, so that the Bar would be kept employed by four Judges sitting constantly in Court, and four Judges would be always sitting in Chambers, working out (with their officers) the details of their cases. In this way each Judge would combine in himself the offices of Judge and Master; the chief clerks or officers would take their instructions immediately from the Judge, and be directly accountable to him. There would not be the loss of time, which now takes place, in transmitting business from one tribunal to another; every proceeding would go forward under the eye of the Judge; if useless delay were occasioned or costs unnecessarily incurred, or vexatious opposition offered, the Judge would immediately repress such misconduct; and it is not too much to say, that a suit in Chancery, under such an improved constitution, might be commenced and ended in less time than is now consumed in bringing a contested cause to a hearing."

As to the working of the Judge-Master principle in India, see *antè*, p. 220.

¹ See some of these already printed, 6 L. R. 308. 315.; 7 L. R. 55.; 10 L. R. 107.

real remedy for the grievances admitted and disclosed but this. And we think it will be found that if the Society had devoted all its time to this subject, it would have been amply repaid by the effectual establishment of this great principle of Procedure, which, we believe, will go very far to remedy the delay and expense now attending the prosecution of suits in Chancery.

Another of the proposals of the Society was, to transfer the administrative business of the Court of Chancery to the Bankruptcy Commissioners¹; and this plan, it is understood, has found favour with the Lord Chancellor, and will be brought forward early next Session in the House of Lords.

There is, however, one great source of delay and expense which it will not affect: we mean that large portion which arises from the existence of two separate and frequently conflicting jurisdictions in the Courts of Law and Equity. In undertaking to promote the fusion of these two jurisdictions, the Society has a task still more difficult to accomplish than the union of the duties of the Judge and Master; and yet here its success in promulgating and obtaining adherence to this great reform is even more remarkable than the progress that has recently been made in the Judge-Master question. It was only so far back as the 18th of November 1850, that Mr. David Dudley Field, on the invitation of the Council, explained to the Society the great change made in this respect at New York, and completed by their Code of Procedure, and now, in the course of little more than a year, this reform is demanded by most thinking men in this country. The Society has received and published three Reports² on this subject, coming from a Special Committee, and these Reports have shown that what has proved so beneficial³ in the United States of North America is quite

¹ Report, printed 12 L. R. 93.

² Printed 14 L. R. 151. (1st Report), and 230, (2nd Report).

³ See as to this the evidence taken by the Law Amendment Society in America, and printed 14 L. R. 284. The judicial testimony in the State of New York alone in favour of the Code in the possession of this Society is as follows:—

Judges of the Supreme Court:—John W. Brown; Amasa J. Parker; Ira Harris; Mr. J. M'Coun. *Judges of the Superior Court*:—Louis H. Sandford;

practicable here. This is a change which, fortunately, the community at large is quite competent to appreciate, and we are delighted to find that in numerous unprofessional quarters, as well from eminent commercial men as distinguished statesmen, this reform is now demanded. Never, indeed, in our recollection did any proposal so important make such rapid and almost undisputed progress. This change, thus brought forward, and supported by all the means in the power of the Society, is surely sufficiently important to engage all its energies, to stimulate all its exertions, and, if successfully accomplished, to place it in the hearts of the people.

The Society has, very recently, had the advantage of a second visit from Mr. Field; and he has had an opportunity of bringing down his account of the working of the Code to the present time. He was entertained by some of the members of the Society, and some of the leading city merchants, at the London Tavern, on the 20th of December, where he made a further statement on the "fusion" question; and, on the 22nd, the whole subject was again brought under the notice of the Society, at a Special Meeting, when Mr. Field was exposed to an examination by the members present. On this occasion, as on all others, he showed a complete mastery of the subject, and delighted his audience by the readiness, candour, and extensive knowledge which he displayed. And this was the more interesting, as it was understood that he had just come from attending an examination before the Chancery Commissioners, where he had been equally successful in removing difficulties and resolving doubts.

This great question has assumed this important attitude entirely through the well-directed exertions of the Society.

III. THE FACILITATING THE TRANSFER OF LAND AND THE REGISTRATION OF TITLES, AND THE SIMPLIFICA-

John Duer; John L. Mason; Mr. W. Campbell. *Judges of the Common Pleas*: — Daniel P. Ingraham; Charles P. Daly. *Judge of the Third Judicial Circuit*: — Carty Wells. This last Judge's communication is dated New York, Dec. 1851. In a letter received from Mr. Field, dated New York, Jan. 6. 1852. He enforces the importance of this body of testimony as a fair expression of the judicial opinion of this State.

TION OF THE LAW OF REAL PROPERTY. — A great portion of the labours of the Society in its earlier years was devoted to these subjects. The confused and even barbarous state of our Law as to land, which effectually hinders its transfer and enjoyment, was too tempting a field for the Law-amender not to be among the first subjects for investigation; and to this department some of the most able and best-considered Reports of the Society are devoted. They chiefly relate to shortening the forms of deeds and instruments in writing; the rendering unnecessary the assignments of terms; the registration of titles to land; the registration of deeds; the insurance of titles; the compilation of a general map of lands; and the subjects of agricultural fixtures and the question known in this country as *Tenant-right*.

All these important subjects have been dealt with in a bold but candid manner, and all of them now stand before the public in an intelligible form. Some direct legislation has taken place in pursuance of the Reports of the Society, but much indirect benefit has also been done by opening up the whole question, by familiarising the subject to the public mind, by calling attention to the prominent evils connected with the present law, and by proposing practical remedies for admitted evils. It has been proved over and over again, by unanswerable arguments, that the present state of the Law greatly reduces the value of land in this country, and that if free trade in land could be obtained, freehold land would greatly increase in value. It is melancholy to reflect that the state of the Law, and that alone, effectually deprives the owner of land of a great part of his property. Here, indeed, then, an amendment of the Law is necessary; and to effect this, the Real Property Committee applied itself. It laid down a plan for a registry of deeds¹ very nearly resembling that which passed the House of Lords last Session, except that a map was recommended, which, though introduced into the original Bill of the Real Property Commissioners, was subsequently abandoned. Connected with this

¹ 4 L. R. 336., and Report on Map, 5 L. R. 385.

was a proposal for the insurance of titles¹, and thus the advantages of the registry were proposed to be brought home to the existing holders of land, the benefit to the landowner being otherwise only prospective. Of this plan it is right to say that the more it has been examined the greater favour it has received ; nor do we doubt that it will eventually prove of the greatest assistance in dealing with existing titles. The establishment of an office for the insurance of titles has proved the practicability of the plan. But besides the registry of deeds, a registry of titles was recommended² ; by means of which land might have been transferred as easily and nearly as cheaply as stock in the Funds ; and this last subject, we hope, will be renewed by the Society, as we believe it to be really practicable and of inestimable importance. A Bill founded on the latter plan was, indeed, brought into the House of Commons by Mr. Henry Drummond. This was not prepared by any member of the Society, and certainly was not perfect in its details. Its principle was, however, triumphant in the House of Commons, and is thus alluded to by a recent writer : —

“ In the mean time, as if to read a lesson to all supporters of a right Cause to persevere and despair not, a Bill was introduced into the House of Commons, not remarkable for its reform tendencies, moved by a country gentleman who had been absent many years from Parliament, neither drawn nor supported by the Real Property Commissioners, opposed by the Home Secretary, the Attorney-General, and the Solicitor-General, who desired to await the report of the then sitting commission — this bill, under every disadvantage, was read a second time, by a majority of ten, warmly supported by country gentlemen of all parties. This result, so emphatically manifesting the progress of enlightenment on the subject, may fairly be ascribed, to a certain extent, to the indefatigable exertions of the Law Amendment Society and to those of its members, who, in the senate, in the lecture-room, in the clubs, in the pages of the ‘ Law Review,’ and elsewhere, had unremittingly devoted themselves to the cause, considering the evils, and weighing the remedies, promulgating the truths con-

¹ 7 L. R. 155.

² Second Report on Registry, 4 L. R. 351.

nected with the system and facing the storm of execration and reproach that is sure at first to assail those who in any way interfere with that which, however fallaciously, is reputed the interest of any special craft."¹

Plans, also, were brought forward for the shortening of forms of deeds, which resulted in the Acts 7 & 8 Vict. c. 119., and 7 & 8 Vict. c. 124., which are to be considered as a legislative protest against the long forms usually inserted in deeds. The direct effect of these Acts has not been considerable, but it cannot be doubted that their indirect operation on the length of deeds has been very great. "Concise precedents" have been hence chiefly derived. More complete direct results have, however, attended the Act 7 & 8 Vict. c. 112., which was founded on one of the Reports of the Society², and has had more effect in reducing the delay and expense attending the transfer of land than any other act of the Legislature, ancient or modern. It has swept away quietly but effectually satisfied terms of years; and notwithstanding some narrow-minded and ill-informed opinions which went to limit the operation of the Act, or to render it nugatory³, it has wiped off perhaps the greatest stain on modern conveyancing. It was well for Lord Monteagle, in his Report on the Burdens of Land, to refer to this Act and the Act for abolishing the lease for a year (4 & 5 Vict. c. 21.), as having relieved the landed interest from very serious burdens. The Property Law Committee of the Law Amendment Society has also published two reports on the subject of agricultural fixtures and the right of tenants to compensation for unexhausted improvements.⁴ These reports may be said to have settled the difficult questions connected with this subject, and a Committee of the House of Commons reported resolutions in conformity with the suggestions here made, after taking

¹ The Registration of Deeds in England. By W. Hazlitt, Esq., Barrister-at-Law. Stevens & Norton, 1851. This pamphlet has justly been commended by Lord Campbell, C. J., in the House of Lords.

² Printed 3 L. R. 183.

³ See these confuted by Sir Edward Sugden, in his able and learned Treatise on the Real Property Acts.

⁴ 7 L. R. 373.

much evidence on the subject¹, which comprised some of the members of the Committee; and by an Act of last Session (14 & 15 Vict. c. 25.), some of their recommendations were carried into law. It is, perhaps, then, in this branch of the Law, that not only most has been effected, but most has been proposed. Sound views have been laid down, much evidence collected, a great impression has been made on the public, and more especially on that of the landowners. The members of this Committee have also done good service by their testimony before Parliamentary Committees, more especially the Committee on Burdens of Land (H. L. 1847), the Real Property Commission (1849), and the Committee on Investments to Middle and Poorer Classes (H. C. 1850 and 1851); and thus by reports, by evidence, by lectures, by pamphlets, by Reviews and other periodicals, and more especially by the Daily Press, the truth is now brought before the Public, and must, sooner or later, prevail. Connected with this subject is the entire Enfranchisement of Copyholds (VII.), on which a Committee of the Society is now sitting, and which may be expected soon to make a report; and thus we may, within a short time, hope to see accomplished —

1. Simplicity and uniformity of tenure.
2. Easy, cheap, and expeditious modes of transfer.
3. Shorter and more simple deeds.
4. A greater certainty as to time in completing the sale and mortgage of land.
5. Some mode of shortening inquiry as to title.

These were the objects which the members of this Committee hoped to accomplish.

About five years ago they were advanced by one of the members of that Committee in an address “to the members of Agricultural Societies, and others interested in land.”

The bare proposition drew down a storm of opposition from a portion of the Legal Profession, a part of which was, perhaps with some injustice, directed against the individual who

¹ This is the Report on Agricultural Customs (H. C.) 1848. See the evidence well digested by W. Shaw and Henry Corbet, in an 8vo. volume. Rogers & Ridgway, 1849.

put forth the proposition. The only thing of importance to the public was, whether the proposals were wise and sound; and we are most happy to say that the demand for these land-measures has now become loud and general: the subject has been very fully discussed; the public has shown itself thoroughly interested in it; and assuredly the present position of the whole question is chiefly indebted to this Committee of the Law Amendment Society.

Here, then, is a boon which may reasonably be granted to the landed interest; and in granting it, all other interests may be served, with no exception: for here, as in other matters, we are highly pleased to see a change of feeling has come over the Legal Profession, and many of its most enlightened members—many most deeply interested in its present position and profits—are not only anxious to see a cheaper and more easy system for the transfer of land, but are willing to devise the means of effecting it.¹ Indeed, this great work of converting the Legal Profession to the doctrines of Law reform, has been no mean part of the service performed by the Society. By stating clearly and BRIEFLY (for that has been, perhaps, the great recommendation of its reports), the reasons for the proposed change, a challenge has been thrown down which has rarely been answered. If the facts were as stated, if the reasoning were correct, the conclusion followed that the amendment should be made. Thus it is that which was formerly the extinguisher, has been set on fire, and the Profession has become divided into two parties, in which the adherents of Law reform are now a strong, united, energetic, and powerful majority; while among the minority, “without are fightings, within are fears.” All that is left them is to consider,

“What reinforcement they may gain from hope,
If not, What resolution from despair.”

IV. The next subject to which we shall refer as having been promoted and advanced by the Law Amendment Society, is that of a *reform in Legal EDUCATION*.

The recent investigation of the subject in the select Com-

¹ See Art. XII., *antè*, p. 372.

mittee of the House of Commons and elsewhere, which have originated with the Society, have established the following propositions:—1. That the Inns of Court, as at present constituted, do not provide a proper system of Legal Education. 2. That they are bound to do this. 3. That the neglect of their duty in this respect, is attended with consequences injurious to the public and the Profession; and that, in the event of their failure, other means should be provided for promoting Legal Education. On the foundation of these principles the Society began to work, and the subject being referred to a Select Committee, two Reports were made.¹ These documents evidently had a double aspect. They proposed the establishment of a Law School through the instrumentality of the Society itself; but they also pointed to such a reform of the Inns of Court as would induce those bodies to bring forward an efficient system of Legal Education. With large funds, with the prestige of a venerable, if not venerated institution,—with good libraries,—with great power,—it is obvious that the Inns of Court may establish, if they please, an admirable Law University, worthy of the science of the Law and of this great country. But if this is done, the object of the Law Amendment Society is accomplished, and their own Law School is necessarily merged in that of the Inns of Court. It is now rumoured, and we believe the rumour to be founded on truth, that a large scheme of Legal Education is about to be proposed by the Inns of Court.

Without pretending to say that the Benchers would not have taken this step of founding a Law University, if the Society had not existed, yet we do not hesitate to assert, that great benefit to the cause of Legal Education has accrued from the efforts of the Society, and that strength was thus given to those Benchers who have always been in favour of a sound system of Legal Education, and who have now been able, as we are informed, to convert their minority into a powerful majority, approaching almost, as we understand, to unanimity.

So far we place it among the successful efforts of the Law

¹ Printed 12 L. R. 106. 428.

Amendment Society, that it has regenerated the Inns of Court.

V. A MODIFICATION OF THE PRESENT LAW OF PARTNERSHIP. — This subject chiefly involves the introduction into England and Scotland of a partnership with limited liability, or, as it is called in France, *en commandite*; and in this investigation the Society was able to have the benefit not only of its legal, but of its commercial, members. Mr. Alderman Salomons, Mr. Ashton Yates, Mr. William Hawes, Mr. Ingram Travers, and other eminent merchants, assisted at these discussions, and the result was, a Report and papers, which have much advanced the proper consideration of the subject. This union of mercantile and legal law reformers is highly important; and at the dinner given to Mr. D. D. Field, already alluded to, this was insisted on by the Treasurer of the Society: — “They had heard,” he said, “a good deal of the fusion between Law and Equity, but he would tell them of another kind of fusion which they were anxious to effect, and which had induced them to hold their present meeting in the City of London—he meant a fusion between the lawyers and the great merchant princes of the City of London, who were equally interested, with themselves, in the work of Law Reform.”—*Morning Chronicle*, December 22. This proposition was received with cheers, and has already been followed by many important adhesions of the mercantile body; and Mr. Dillon, in acknowledging the toast of “the Merchants of the City of London,” expressed his joy that the work of real Law Reform had at last commenced. Here, also, may be mentioned the Branch Law Amendment Societies formed in Glasgow, Aberdeen, Perth, and other towns, composed of merchants and lawyers in those places; an example which there is reason to suppose will be followed in many other towns in the United Kingdom. This subject of Limited Partnership has been also investigated by a Select Committee of the House of Commons in 1850 and 1851. In the Reports and Evidence of 1851 (in which last it is to be observed, the Report of the Law Amendment Society is referred to) it was resolved, that the Law of Partnership requires revision; and the Committee recommend for that pur-

pose the appointment of "a Commission of adequate legal and commercial knowledge, to consider and prepare not only a consolidation of the existing law, but also to suggest such changes in the law as the altered condition of the country may require."

Having thus glanced at some of the principal subjects which have come under the notice of the Society, we think it will be allowed that the Society has taken possession of nearly the whole domain of the law, which was universally admitted to be in a hopeless condition. It has declared it in a state of siege, and has invited to the attack all persons competent to assist, or disposed to aid. It has erected a standard as a rallying point for the friends of Law Amendment, or all those aggrieved by the existing law. But it has not attempted to effect its objects either by clamour or even by agitation. Inquiry and deliberation are the instruments which have been employed on all occasions. The well-informing Parliament, the rendering available professional knowledge for the assistance of those who are less technically instructed, — this is the object and practice of the Society; nor did it attempt to amend the law before it was admitted, on all hands, to require great and radical reform. Committees have investigated and reported. It has delegated a particular subject to such of its members as appeared from its nature to be best qualified to deal with it; but it has expressly invited the assistance of any other of its members, and by its eighteenth rule, "Every member shall be at liberty to inscribe his name on any Committee in which he wishes to act." This excellent and liberal regulation prevents the possibility of packing a Committee, or the exclusion, as too often happens in Crown Commissions, of the very person who has originated the discussion, and is best qualified to assist it. Thus no light is shut out; the breath of free opinion circulates; no private interest or particular bias sways any Committee; and the only object it has in its researches is the TRUTH. We do not hesitate, therefore, to say, that for its discovery these Committees are usually better instruments than a Government Law Commission, as usually constituted; and we need only point for an illustration of

this to the Common Law *Commission* last appointed by the Government, and to its one Report, and the two Reports of the Common Law *Committee* on Process and Pleading, and their three Reports on Law and Equity Procedure; and let the reader pronounce which of the two bodies have done most, which is most likely to be followed as guides by the Law Reformer and the Legislature, and which is most likely to effect any permanent good to the cause of Law Amendment. Of this it would be well that Government should be aware. The public have confidence in the Reports of the Society, as coming from an unprejudiced quarter. This confidence is a plant of slow growth, and should not be hastily slighted.

These, then, are some of the services performed by the Society to the cause of Law Amendment; but they are only a part. Besides these measures, chiefly, if not entirely, proposed by itself, it has powerfully supported all other measures and institutions calculated to improve the Law and its administration; of these, we may notice four:—I. The Incumbered Estates Court; II. The County Courts; and III. The revival of Legal Education by the Inns of Court, as already mentioned; and IV. The regeneration of the Bar, and its adaptation to existing circumstances. And as to these and other matters, we may observe that the Society has availed itself of all the willing aid which could be given by our pages, and has allowed us to represent the wishes and sentiments of its members, when it was more convenient to use this form of communication with the public; for in all kinds of combat, whether we carry on the war on long established abuses or on corporeal substance, it is necessary to adopt the means to the end, and to vary the mode of attack.

“ I boarded the king’s ship, now on the beak,
Now in the waist, the deck ——
Sometimes I’d divide
And burn in many places,
Then meet and join —— ”

It is right, therefore, to state the precise connexion which exists between the Law Amendment Society and the Law

Review. This is stated in the Third Report of the Council, dated June 17. 1846, in which is the following passage : —

“ We are desirous that, in conformity with the approved practice of almost all other Societies, we should endeavour to obtain as extensive a diffusion as possible of the Reports and proceedings of the Society. Having considered whether we should establish a separate publication for this purpose, or avail ourselves of any existing publication, we have come to the conclusion, that it would be both cheaper and more advantageous in the first instance to avail ourselves of an existing publication, if a suitable one could be found willing to forward the views of the Society. We have now much pleasure in announcing, that we have been able to make an arrangement with the Publishers of the *Law Review* (which has from its commencement promoted objects similar to those of the Society), *by means of which the Reports and proceedings of the Society will be regularly published, and a more permanent record of the proceedings of the Society be obtained.* According to this arrangement, the members of the Society will henceforth be presented with the *Law Review*, commencing with the current volume of that work.”

With this understanding, we have, as it were, on our own parts, undertaken certain adventures, and delivered certain battles, which on the whole, have turned out well ; but any laurels that we have gained, we most willingly lay at the feet of the Society, which we acknowledge as the *fons et origo* of the *Law Review*. Let us then proceed to show in what way we have endeavoured to forward the great objects to which we have alluded.¹

L. THE INCUMBERED ESTATES COURT.—It will be seen by an Article entitled “Land Measures for Ireland,”² that we

¹ It has been our wish temperately, but steadily, and, so far as is possible, without giving offence to any one, or writing unnecessarily, or ungentle, an unkind word to further the cause of Law reform ; we wish we could say that we have always been able to fulfil our own desires. Still more, that we deserved the compliment of Mr. C. P. Cooper, when he calls ‘this Review “a periodical, of which it may safely be predicted, that it will do more for the reform of our Law and of our Courts, than any publication prior or contemporary has done.”—*The Delay in the Offices of the Masters in Chancery, and the Remedy*, 2nd ed. 1849.

² 10 L. R. 1—22.

have stated our claim to the idea of establishing a Court of this nature, for dealing with land in Ireland, and we have since lost no opportunity of supporting the principle of the measure, or of stating its force and operation. Nor have we here stopped: we have considered this principle with reference to England, and in some modified form we believe it to be applicable. Some official investigation of titles must take place, the reasons for which we have very recently stated¹; and the power of giving a parliamentary title should be vested somewhere, either in the Court of Chancery, or in some special tribunal created for the purpose. We incline to the latter. This, coupled with an application of the doctrine of insurance to titles of land, would enable the landowner to deal freely with his own.

II. THE COUNTY COURTS.—If the Law Amendment Society, by any of its offshoots or members, has any claim to recommending the establishment of the Incumbered Estates Court, its title to the parentage of the County Courts, through its President Lord Brougham, is far stronger. It will not be disputed that to him more than to any one else is this country indebted for their conception, for their maturity, and for their extension, present and future.

Since their establishment the Society has given them its constant support, as a real and efficient means of obtaining justice in the matters within their jurisdiction, and as the most effectual mode of enforcing a reform of the Superior Courts.

III. and IV.—The efforts of the Society in support of LEGAL EDUCATION have already been noticed, and the mode of regenerating the Bar is provided for in its most recent Report printed, *anté*, p. 377.

And now having done so much, what remains for the Society to do. Alas! how much is yet undone, almost unattempted. We see—

“ All its great work to come, before it set;
How to begin, how to accomplish best
Its end of being on earth and mission high.”

Par. Reg. b. ii. 112—14.

¹ See *anté*, p. 174.

Thus much we will say. The general management of the business of the Society falls on the Council. They have hitherto conducted it with no want of activity or energy. They have been bold, but also cautious. They have brought forward subject after subject for discussion and investigation opportunely, and they have not distracted the minds of the Members or the Public with too many questions. They have had

“ A mighty maze, but not without a plan.”

If we might be permitted to give a word of advice to our respected parents, we would entreat them to adhere to the same course which has hitherto been crowned with success.

Keeping in view all that they have hitherto proposed, let them now endeavour to accomplish and perfect the measures necessary to their completion ; and for new proposals, let them steadily adhere to those three which we have already touched upon. 1. Codification ; 2. The relations of the Bar, and the Attorney with each other, and with the Public ; and, 3. The establishment of some sound system for the administration of *Private Trusts*.

1. CODIFICATION.—This involves the whole of our Statute and Common Law. Let the Society press this upon the Government, upon Parliament. Let its members rise early and late take rest, until some progress is made ; some organisation established for accomplishing this great work. Let us not be behind all other civilised nations in this, as we are before them in most other things. Let us hear what Mr. D. Field said on this as the result of his recent tour in Europe :—

“ He had visited various countries in Europe, and he had found in almost all of them a spirit of Law Reform. In Sweden and Norway they were discussing a new Code ; in Russia, they had just got one ; in Greece, a new Code had been provided ; in Sicily and Sardinia, and even in Turkey — be-nighted Turkey,—the great object of agitation was the new code Tanzimat, against which certain Pachas had rebelled, because it took from them the power of the bowstring. If then, in those countries, earnest and patient thinkers were bent upon a reform of the Law in the midst of the violent

throes of the times to which they were subject, that ought to encourage England and America to go on in the same course. But however that may be, England and America must go on to stimulate each other. . . . Let them be henceforth mutual teachers and helpers. Let them be rivals, not in the arts destructive, but in arts peaceful and conservative. That was the only rivalry which left no sting behind ; it was the only one in which those who won and those who lost, the victor and the vanquished, might rejoice together."

It will be a duty worthy of the Society, to cherish and keep alive this feeling, which may be of the utmost advantage to the science of the Law, and even to the other great interests of the country ; to the best interests of civilisation. Here is a common field for the united exertions of both countries. In these days of rapid transmission of ideas, much mutual benefit would be derived by the free interchange of thought and mental labour in the great task of re-arranging, digesting, and codifying our whole body of Law ; and thus it might be possible to have one Code common to all people speaking the Anglo-Saxon tongue.

2. THE LEGAL PROFESSION.—No person can doubt, who attentively watches the signs of the times, that a new era is dawning upon the Legal Profession. Of this, perhaps, we have recently said enough ; but it will be the duty of the Society to watch over the lawyer and his relations with the Public ; to render the Bar what it should be—a useful and an honourable Institution ; to call out all its energies, and develop all its talents.

IV. TRUSTEESHIP.—This subject has been already touched by the Society : it is one of the pressing wants of modern civilisation. We must learn when it is necessary to leave the domain of speculation, and descend to the field of action. There are many years of useful labour for the Society. Indeed, we wish we could think that there was a fair prospect of its termination.

**ART. XVI.—REPORT OF THE EQUITY COMMITTEE
OF THE LAW AMENDMENT SOCIETY ON THE
MASTER'S OFFICE.**

A PAPER on the subject of the procedure of the Master's Office, read before the Society on the 10th of November last, having been referred to this Committee, they beg now to present their Report on the same. This Committee have already given much attention to the important subject of the Master's Office, and a Report directed expressly to its improvement was made by this Committee, and was received by the Society in the year 1847. There was also presented to the Society at the same time, a proposed Report, which represented the opinion of some of the members of this Committee. The principal difference in the views taken in these documents was, as to how far the present system of referring portions of suits, or inquiries arising out of them, to the Master was advisable, and the question is further raised in the paper which is now referred to this Committee. This Committee have also had before them the Report of another Committee of this Society, recommending the fusion of the jurisdictions of Courts of Law and Equity. This recommendation has the entire support and concurrence of this Committee. They believe that the recommendations made in the present Report will apply to suits in Equity as they now exist ; but if the fusion of Law and Equity were carried into effect, the subject matters of such suits must be dealt with by the Judges under any new system, and, in the opinion of this Committee, they cannot dispose of suits in any manner so beneficial as that recommended in this Report. With this observation this Committee proceed to consider the subject referred to them.

The duties of the Court of Chancery are of a compound character, and consequently it sometimes happens that questions of the greatest difficulty arise, and require for their decision the utmost learning in the law, and the most acute powers of judgment upon fact ; while at other times, all that is wanted on the part of the presiding officer is care, attention, and a knowledge of the routine practice of the Court. This being the case, it is easy to understand why attempts

should have been made, from time to time, to separate that portion which seemed to require the personal superintendence of the first law officer in the kingdom, from that portion which might be properly performed by men of inferior station and acquirements: so long as it was not only the theory but the practice of the Court that the Lord Chancellor himself should hear causes in the first instance, there might have been reasons, which do not apply now, why it was desirable to withdraw from him, as much as possible, all business of a merely routine character, and refer it to a Master, who, it may be observed, originally sat with the Chancellor at the hearing of a cause: but, inasmuch as three Vice Chancellors have been appointed, before whom and the Master of the Rolls all causes are now originally heard, and as there is little doubt that the Lord Chancellor will seldom hear any causes except by way of appeal, the question arises, whether the duties incident to the determination of a cause should continue to be divided between two judicial officers, each of them subordinate relatively to the Lord Chancellor, and one of them inferior to the other. The circumstance that the original hearing of every cause is now before a judge inferior to the Lord Chancellor, may afford an additional argument why no portion of the judicial duty in a cause should be transferred to a still lower tribunal; but, independently of this fact, there are strong reasons for contending that no division of one cause between two judicial officers could ever be so made as to be advantageous to the suitor. Perhaps the best mode of establishing this proposition will be by examining the present distribution of judicial labour between a Vice-Chancellor and a Master. Every cause is at present brought, in the first instance, before either a Vice-Chancellor or the Master of the Rolls, even though it may not be then in such a state that one single point in it can be determined. A reference is then made to the Master, in terms which are frequently a matter almost of course. When this is the case, it seems obvious that the original hearing is an expense wholly caused by the circumstance that there is a division of duty between the Judge and the Master. The decree first made does not decide a single question in dispute; it does not ad-

minister or distribute any property. All that results from it is a mere definition of what portion of the cause shall be transferred to another tribunal. Attempts have been recently made, under Orders of Court, and Sir G. Turner's Act, to enable parties to obtain orders from the Court, as of course, for certain preliminary inquiries before the Masters; but this course has not been found effective, and orders of this nature are, it is believed, now rarely made. After the Master has made his report (that is, in many cases, after the whole cause has been virtually determined), a further hearing by the Court is necessary to give effect to his decision. In such cases, the expense of the second, as of the original hearing, is created by the division of duties between the Judge and the Master. Had the Master been the sole Judge, he would, when he made his report, have been in a condition to decide the cause, and no further hearing would have been necessary.

The evil, however, is not confined to the mere transfer of the cause from one tribunal to another; but the Office to which it is thus transferred, is in itself peculiarly inadequate to the proper performance of many of the duties thus cast upon it. The Master does not, in fact, possess the powers suitable and necessary for a Court which has to adjudicate upon disputed questions of importance, and administer property subject to various and complicated claims. He has little authority or control over the suitors who attend before him. He cannot usually make any order as to costs. He cannot insure diligence or activity in the conduct of a cause, even when the object of the suit is to vindicate the rights of a person under disability. No opportunity is provided for him of publicly commenting upon the negligence or misconduct either of the parties to the cause, or their agents. He has ordinarily no power to punish witnesses for perjury, and he cannot commit for contempt. That perfect publicity of proceedings, which in so many cases operates both as a wholesome restraint and an efficient stimulus, does not exist in the tribunal of a Master in Chancery. The Court above, though it scruples not to cast upon him the labour of investigating matters in dispute, and the difficult task of coming to a conclusion, seems to put no confidence in his discretion, and denies him almost the power of action.

With respect to suits for the administration of the estates of deceased persons, this Committee have already reported their opinion, that the Master might exercise jurisdiction without any original hearing or reference from the Court above; and, assuming that the Court of Chancery were to remain in other respects as at present constituted, this Committee would still adhere to their opinion; but they have been led in their present inquiry to the conclusion that a much more fundamental alteration ought to be effected. In following out this inquiry, this Committee have examined the forms of reference in various suits, with the intention of discovering some general principle in the division of judicial duties between the Judge and the Master, with the hope of thence determining whether there are any advantages in such a division to compensate for the obvious increase of expense it occasions. The Committee are wholly unable to ascertain that Courts of Equity adhere to any settled principle in determining what they will refer to the Master and what they will decide themselves. Forms of reference seem to have grown up and been adopted whenever the Court has found itself in a difficulty, without its being much considered whether a transfer of the difficulty from one tribunal to another was the best mode of effecting its solution. In some instances, the form of reference is such as to transfer to the Master the whole cause, involving, perhaps, the decision of a most difficult question of Law or Equity. Should there be no appeal from his decision, he it is who virtually hears and determines the whole case; and the part performed by the Judge, as well at the original as at the subsequent hearing, is mere matter of form. This is the case in a suit for the specific performance of a contract, where the point in issue is the validity of a title. The cause is really heard by the Master, and both the original hearing and that upon further directions are, when the parties are satisfied with his decision, useless and expensive excrescences; and this is the more striking when the Master resorts, as he frequently does, to counsel for his opinion on the title. Should the parties not be satisfied with his decision, an appeal (not in the most convenient form) lies to the Court above; and it is only by

this expensive process that the opinion of a Superior Judge can be obtained. There is then another appeal, namely, to the Court of Appeal in Chancery, and thence to the House of Lords; and at any of these stages it may be referred back to the Master to review his report, and the same series of appeals may thereupon be repeated. It must not be supposed that the application of these observations is confined exclusively to suits for the specific performance of a contract. There are many other cases in which all the real difficulty of the cause is transferred, in the first instance, to the Master; where the original hearing, and that upon further directions, may be, and frequently are, almost useless formalities; where there is the same certainty of appeal from the tribunal before which the cause is first heard, and the same liability to a series of successive rehearings. Thus, taking two instances, by way of illustration, amongst causes recently heard. In one case the right to relief depended almost entirely upon the fact whether there had been a binding contract between the plaintiff and the defendant. The decree made by the Court in the first instance, was a reference to the Master to inquire whether any and what binding contract existed between these parties. In another case, the bill was filed for payment of a specific legacy, the plaintiff alleging that the personal representatives had assented to his legacy, and that he was therefore entitled to immediate payment. The defendant denied that any such assent had been given, and contended that they were not bound to pay the legacy without an indemnity. Under these circumstances, the decree directed a reference to the Master to inquire whether any assent to the legacy had, in fact, been given; and the Master was further to inquire whether the defendants were entitled to any, and what indemnity. References of this kind not only do not solve the question in the cause, but they frequently impose upon the Master a task of greater difficulty than the Court would have to perform should it take upon itself the decision. For the Judge who directs the reference, exercises his ingenuity to frame inquiries upon every possible point that may be useful or necessary for the decision of the cause, and the Master has no option but to report fully thereupon. Whereas, should the Court endeavour itself to solve the dis-

pute, it would frequently happen that the clear establishment of one point would preclude any necessity for further inquiry as to others. In addition to these evils already enumerated, as resulting from references of this nature, it may be observed, that they tend to make the parties negligent in preparing their evidence before the cause is set down for hearing, for they rely upon having an opportunity afforded them for supplying all defects when the cause is transferred to the Master's Office. Upon other references, the proceedings before the Master are subsequent to, and consequential upon, the decree, or involve in themselves the very relief which is the object of the suit. This is the case in a bill simply for an account, or for the administration of the property of an infant. The Committee believe that upon references of this nature, much of the duty is at present done by the Master's clerk. Whenever this is the case, there seems no reason why such duty might not be fitly transferred either to some subordinate officer expressly constituted for these particular functions, or to an official bearing the same relation to the Judge that the Master's clerk bears to the Master.

Many other instances might be mentioned of the evils produced by transferring causes by means of reference to the Master; but the Committee consider that the above are quite sufficient to illustrate the object they have in view, in pointing out the vexatious delay and expense occasioned to suitors by this practice. One general objection to all references appears to this Committee so important as to require special notice. It is, that the Judge who orders the reference has not forced upon his attention the great expense occasioned by the minute inquiries he directs. He disposes of the case, as it is called, by transferring it to another tribunal, relieving himself from all responsibility, by considering that he only adheres to an established practice. Against though the Master, to whom the case is transferred, in course of his inquiries, is made acquainted with the exp and inutility of many of the matters referred, and also haps, in some instances, with the insufficiency of the ence, yet he has no power to obviate the evil. It is duty to follow the directions imposed upon him by t

ence; and their being no discretion vested in him, he necessarily feels no responsibility. Lastly, when the cause comes back to the Court upon the Master's Report, and on further directions, the difficulties which have attended the inquiry are not apparent on the face of the Report; but should the Master have deviated in any degree from the literal terms of the reference, the Court exhibits but little sympathy with his embarrassments; and, probably, by referring it back to him to review his report, casts an implied censure upon his conduct. The result is, that neither Judge nor Master feels that any blame attaches to himself when cases of gross injustice are mentioned respecting the Court of Chancery. Whereas, should each cause be heard throughout by one Judge, he could scarcely fail to become cognizant of every case of hardship as it occurred.

These arguments have recently received great confirmation from the publication of the evidence taken before a Select Committee of the House of Lords last Session, appointed to consider the Bill for giving Primary Jurisdiction to the Masters in Chancery. The present Master of the Rolls, in answer to Q. 833, said, "I have long entertained the opinion that a great number of references to the Master might be avoided, and the modern disposition of the Courts is to avoid them. I myself, in the very short time that I have been in a judicial situation, have repeatedly made orders in which formerly a reference would have been directed to the Master. I said, 'If you will give me sufficient evidence, and satisfy me of the propriety of it — the same evidence as would satisfy the Master — I will make an order.' I think you might diminish a great quantity of the business before the Masters' Offices, by requiring the Court to take more upon itself; and which, with the present force of the Courts, might easily be done." And his Honour states that this is now the practice, not only of himself, but of the Vice-Chancellors. Speaking of applications for the appointment of new trustees, his Honour says, in answer to Q. 839, "It would be referred to the Master undoubtedly, according to the common course of proceeding, not necessarily; for, as I stated before, I believe that the common practice of the Vice-Chancellors at present is, in a great number of those cases, and, when

they can, to determine upon them at once, as I have already stated; in all cases where I can deal with the case safely without reference to the Master, and the parties produce sufficient evidence to satisfy me, I make the order at once." The proper mode of proceeding is thus referred to by his Honour, in answer to Q. 853., and the following question: "I have no doubt that a great deal of useful work might be done by the Court adopting some of that practice which exists at Common Law, of sitting in Chambers." And in Q. 854., he is asked as to "The practice of sitting in public, and being attended by counsel, and hearing solemn arguments upon important matters, whether of law or of fact, and then going to Chambers, as the Common Law Judges do, and disposing of minor matters at chambers." His Honour says, "Yes; and which are best settled across a table." And again, in Q. 855., "Your Honour does not consider that there would be any degradation or any lowering of the dignity of the learned Judges in this practice?" "Not the least; I should willingly do it if it were required to be done. Of course, you must take into consideration that it must take up time." And Mr. Vice-Chancellor Turner, in answer to Q. 676., says, "Very material modification has taken place, and is taking place, in every branch of the Court upon this subject; and the references which are made to the Master by the Court are not nearly so frequent as they used to be. For instance, in the case of the appointment of trustees under the Trustee Act, I have generally said to the parties, 'Name the persons whom you propose to be trustees, and bring me an affidavit of the respectability and credit of those parties, and I will appoint them at once without reference to the Master;' and that has been adopted to a much greater extent by Vice-Chancellor Knight Bruce." The evidence of Mr. Edwin Field, the solicitor, may also be referred to as confirming the evidence of these two learned Judges, and also more especially as to the dangers of the divided responsibility existing under the present system in another branch of the Court. He points out that, in a case in which he was concerned, a sum of 190*l.* stock, belonging to a poor schoolmistress, was paid out of Court improperly. "I wish to say," says Mr. Field, "that I believe the great irregularity

I have spoken of, in this case, was owing entirely to his Honour the Vice-Chancellor (Wigram) trusting to counsel; they trusted, I suppose, to the solicitor, and the Registrar, I suppose, trusted to the Judge, and the Judge, to some extent, trusted to the Registrar; so that no one felt exactly the responsibility was especially on him; and a circumstance so grossly and palpably irregular as the one I here mentioned, passed through. It was the divided control that caused this irregularity to pass through." The getting this matter set right cost 100*l.*, which appears to have been paid out of the fund.

Without referring to much other evidence to the same effect from persons of eminence and experience, it is sufficient to say that there is nothing having a contrary tendency in the important evidence to this Report; and this Committee believe that all the Judges of the Court of Chancery are now resolutely acting on these opinions so expressed. It may properly be added, that Sir E. Perry, the Chief Justice of Bombay, has for some time been acting on the plan of working out his own decrees with complete success. In a letter on this subject to a Member of this Committee, he says, "I am able to give you most satisfactory evidence as to the speed, certainty, ease, and satisfaction to the parties, with which decrees are worked by the Judges."

The Committee may also notice, that the recent great addition to the judicial power of the Court of Chancery would give great facilities for trying this plan; and it may be suggested, that if the Masterships as they become vacant were not filled up, but the Master's clerk and staff transferred to any of the Judges willing to work out his decrees, this might give an effectual mode of trying the advantages of the plan, and not disturb too far the present system, if the new plan were found impracticable.

Such being the state of the argument, authorities, and evidence on this subject, the Committee are prepared to withdraw their former opinion, given at a time when this subject had not received so much consideration as has since been bestowed upon it; and they now recommend that, as a general rule, in every cause, all disputed questions, whether of fact or law, should be decided by the Court before which the cause

is set down; and that in every cause in which, according to the present practice, the Court, either for the protection of absent parties, or for other reasons, requires evidence to be given on facts not in dispute, the same Judge should himself examine and decide upon such evidence; and that in all cases in which facts are in dispute between the parties, such facts should be decided by the Judge by evidence taken *vivâ voce*, if the Judge shall think fit; and that the parties should have the option of submitting such facts to a trial by Jury, under the direction of the Judge. In this manner, the purely judicial duties of the Master would be entirely superseded by the Court.

With respect to the administrative duties now performed by the Master, the Committee are of opinion, that many of them might be more suitably performed by officers of inferior station. For instance, an officer might be appointed to manage and superintend the sale of estates. Professional accountants might be employed to take accounts; such subordinate officers should act under the direction of, and in immediate communication with the Judge; and when any question of difficulty arose, the suitors should have the privilege of obtaining his opinion. The Committee may refer to the practice which now prevails in administering the estates of bankrupts and insolvents, as affording, in some respects, an illustration of the nature of the change thus proposed. The Commissioner or Judge in bankruptcy has complete superintendence of a case throughout. He is assisted by official assignees and other officers, created for particular purposes; but there is no division of judicial duties between him and any other officer at all resembling that which now takes place between a Judge in Equity and a Master.

This then, is the general rule which this Committee would recommend should be adopted in suits in Equity. But they admit, that it might not be applicable to every possible description of suit. They are disposed, therefore, to recommend that parties should have the option of referring a cause to certain official referees, subject to certain regulations. These are, that no reference should be made at the trial or hearing of any cause within less than ten days previous to such hearing, and that all such references should be made, either

with the consent of all parties, or by summons at the instance of either party. The Committee are also of opinion that in certain cases of long and intricate accounts, the parties should be compelled to refer them to an official accountant. On the whole subject of this Report, the Committee submit the following resolutions for the adoption of the Society:—

1. That the present practice of commencing suits in Chancery before a Judge, of referring either the whole or a part of the matters involved in the suit to the Master, and of reporting the Master's decision to the Court for its ultimate determination, is the cause of the greater part the delay and expense of Equity proceedings.

2. That suits in Equity might be most advantageously disposed of by the Judges sitting in Court or in Chambers, as might best suit the circumstances of the case.

3. That the office of Master in Chancery, as at present constituted, should be abolished; and that with this view, vacancies in the office, as they occur, should not be filled up.

POSTSCRIPT.

No Session of Parliament ever opened under circumstances of greater interest to the particular cause which we represent. There are other subjects of importance before the Legislature;—a change in the mode of representation—war—peace—finance—ministers;—on all these we have nothing to say; but there is this distinction between Law Amendment and all other subjects, that as to its necessity all are agreed. We know not which of the four parties in the state to mention as most desirous to promote Law Reform.

Is it that which adheres to the present Ministers, who have constantly placed recommendations of this nature in Her Majesty's addresses from the Throne and who are the authors of so many useful Law Reform measures? Is it the party of the late Sir Robert Peel, who, when living, constantly and usefully supported this cause? Is it the party of the Earl of Derby, which now demands many specific Law Reforms as facilities for the transfer of land, an alteration in the Law of Partnership, and cheap and simple Law Procedure? Or shall it be the Radicals, who have long contended for all these and much more? Here, then, is a subject on which all parties are agreed, and as to which action only is necessary; and we have on this occasion, or very recently, shown the present state of most of the important questions connected with it.]

Of these some system of Registry, as applied to dealings with land, is, perhaps, the most important. It is in vain to oppose the feeling in favour of some alteration of this nature. We do not know that the Bill which passed the House of Lords last Session is the best that can be devised, but it is useless to oppose it without proposing a better. The temper of the landed interest and of the commercial classes will no longer tolerate the existing system. We have only to recall what happened on the division of Mr. Drummond's Bill in 1849, and we find how the squires beat both the Lawyers and the Ministers; and as to the opinion of the mercantile classes, we make a note from one of Mr. Cobden's speeches, which may serve as an indication of their sentiments on the subject:—

"What was there," he said, "to prevent half a dozen merchants, such as were met on the platform, from devising a mode for registering of the land? Let them take advantage of the survey that was now going on throughout the country, then let a register be made of all existing properties, and let all claims be barred after a certain number of years. Then let them require that every purchase should be registered, and where would be the difficulty? But, then, let it be done by men of common sense, who would disregard the pretences of lawyers."—*Mr. Cobden at Leeds, Dec. 9. 1850.*

Now, this may be thought very absurd at Lincoln's Inn, but our readers may be sure that it is not so considered in many other places in this country, and more especially in Parliament. It is there thought to be sound sense, and unless this feeling is properly met by impartial persons, a measure will be adopted, the least evil of which perhaps, will be, that the profits of the lawyer will be roughly dealt with, if not swept entirely away. We regret, then, that Sir Edward Sugden has thought it right at this period to reprint his old objections to Registration in a pamphlet under a new title, *Shall we register our deeds?* but has proposed no plan for meeting our present difficulties. He justly states himself to be not unfriendly to the principle of registration, and refers to his own measures both in England and Ireland for registering Crown Debts and other incumbrances for the benefit of purchasers. We wish he had applied his mind to larger measures; as it is, not even his great learning and experience will avail. A Register of titles, persons interested in land will have, and they are the true friends of the Profession who charge themselves with the duty of discovering the means by which this wish may be gratified.

Of no less importance than this will be the steps taken by the Government as to PROCEDURE. The subject of "fusion" has been brought before the Chancery Commissioners by Mr. Dudley Field, who was examined by the Commissioners; who, if they do not agree with his conclusions, will probably state their reasons for it. At the time that this is written, we are not in possession of their Report. Public notice has, however, been given that the Common Law Commissioners have prepared a Bill which is to carry out the recommendations contained in their Report. Our opinions as to their insufficiency are already before our readers (L. R. for August, 1851), and we shall certainly be amazed if this Bill is even proposed previous to the production of the Chancery Commissioners' Report, which is the orthodox stop-gap for opposing all other proposed Reforms. It will be the more remarkable, as copies of this important Bill, which is no other than a new Code of Procedure, have not been issued to the Profession, and many persons interested in the subject have in vain applied for them, and yet, in the marginal notes of the measure, which have

(with apparent correctness) been printed in some of the Newspapers, it is proposed that the Bill shall come into operation on the 5th of April, 1852.

This intention, if carried into effect, would indeed be a legal *coup d'état* worthy of the other side of the Channel. We cannot believe, however, that it is the wish either of the Commissioners or of the Law authorities to pass this Bill without ample discussion. It would have been our duty to have given it full consideration could we have obtained it; as it is, we have had no opportunity.

The movement in the Profession, and more especially among the Junior Bar, continues, and we believe that the subject of the relations between the Bar, the Attorney, and the Client, will shortly be brought before Parliament. The repeal of that part of the original County Court Act which compels the client to employ an attorney will afford a fitting opportunity. In the meantime, several interesting opinions on the subject have been elicited. Let us give one of them.

At the Middlesex Sessions the learned Judge said, "he wished it to be distinctly understood that there was no necessity whatever for the intervention of a third person between counsel and prisoners. Every barrister, not only in the Criminal Courts of the metropolis, but on the Circuits, who was not otherwise engaged, was bound to take up a case if called upon by the prisoner in the dock, and also to receive the fee from him. There was not the slightest necessity for the interference of any attorney or of any person who went about in the character of an attorney's clerk; and he wished it to be distinctly understood that counsel could be instructed by prisoners themselves."—*Per Serjeant Adams, Assistant Judge, Middlesex Sessions, Tuesday, Dec. 23, 1851.*

We are happy to find that two new weekly legal periodicals are to be added to the existing list, both having decided Law Reform tendencies. *The Legal Examiner* has already appeared; *The Legist* is about to appear shortly. These publications, we think, are a legitimate and useful mode of developing the talents of the Junior Bar; and they have both of them our hearty wishes for their success. They prove, among other things, that the Profession demands publications of this character and complexion, as representing their wishes and prospects. We are quite satisfied that one of the first questions which will be asked by the client before employing a professional man will soon be, "Are you a Law Reformer?"

We much regret to have to record the death of the late Lord President Hope, of whose life we shall endeavour to give some account in an early Number. An account of the death of Mr. John Reddie, Chief Judge of the Small Debts Court at Calcutta has also reached us. He was a zealous law reformer and amiable man. His exertions in that Court were highly valuable, and not only gained the approbation of the authorities of that Dependency, but obtained for him the sanction of the Bar, and the respect of all other classes.

Michaelmas Vacation, Jan. 29. 1852.

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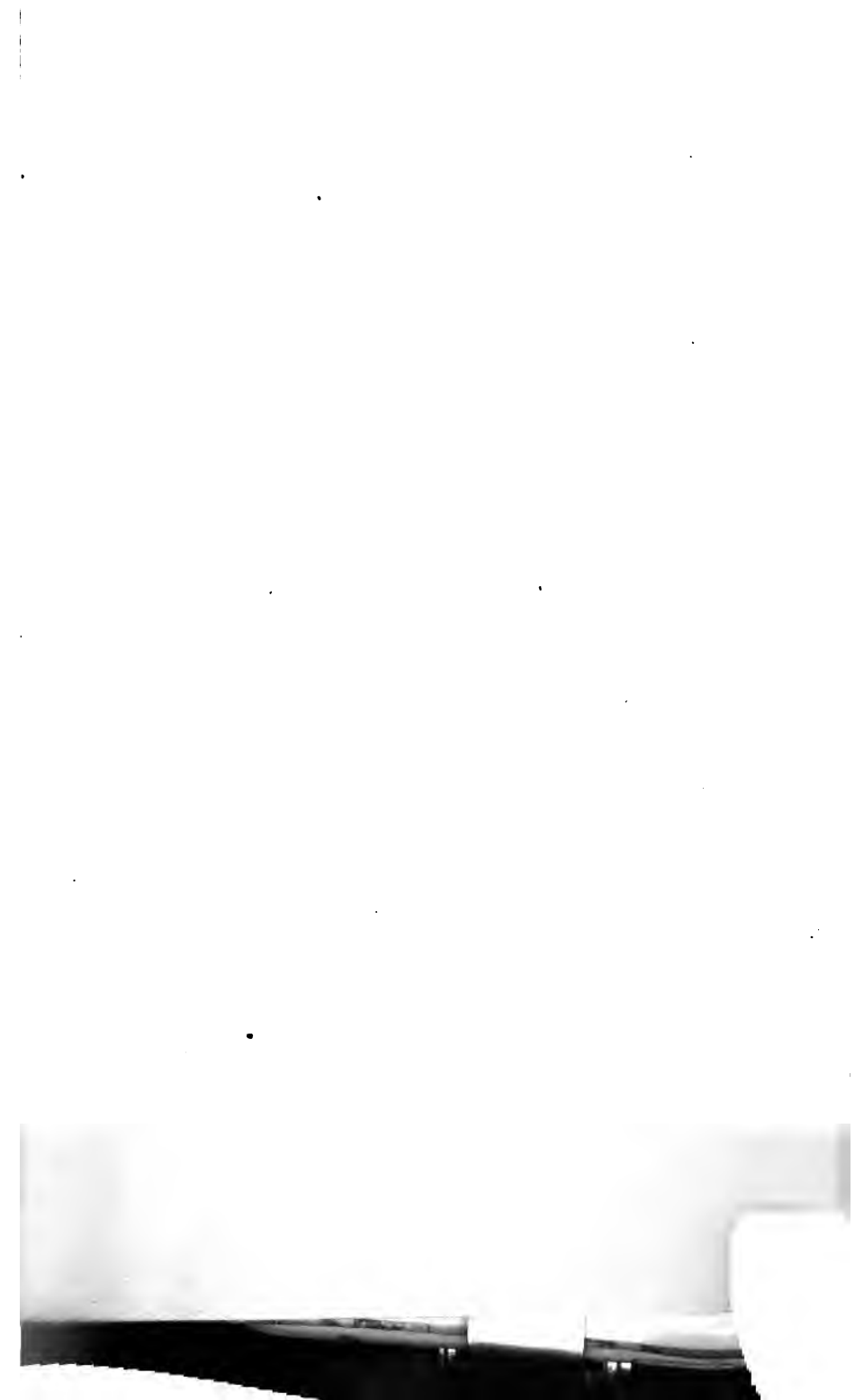
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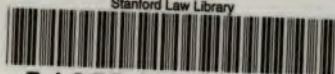
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